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In the Supreme Court of the United States

SENAIT KIDANE TESFAMICHAEL AND
DAWIT TESSEMA-DAMTE,
Petitioners,

v.

ALBERTO GONZALES, U.S. ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration and Nationality Act ("INA") permits the Attorney General to only grant asylum to individuals who are "refugees" under 8 U.S.C. § 1101(a)(42)(A). The determination of whether a person is a "refugee," in turn, depends on a threshold determination of a person's "nationality." The Seventh Circuit has held that an applicant may be considered a national, and therefore a refugee, of a country that has stripped her of her citizenship. In this case, the Fifth Circuit held that a person may *not* claim she is a "national" of a country that stripped her of her citizenship and expelled her from the country as a part of a nationwide campaign against a specific ethnic minority. Accordingly, the question presented is:

Whether a person is a "national"—and therefore a "refugee" potentially eligible for asylum—of a country that has stripped her of her citizenship and expelled her from the country where she was born and raised?

PARTIES

The names of all parties appear in the caption.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a–16a) is reported at 469 F.3d 109. The opinion of the court of appeals granting a stay of removal (App. 20a–34a) is reported at 411 F.3d 169. The Board of Immigration Appeals' decision dismissing the appeal of the decision of the Immigration Judge (App. 35a–39a) is not reported.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The Appendix contains the text of 8 U.S.C. § 1101(a)(42)(A), which defines the term "refugee" under the INA (App. 82a–86a); 8 U.S.C. § 1158(a), which describes the Attorney General's authority to grant asylum and statutory exceptions to that authority (App. 91a-92a); and 8 C.F.R. § 208.15, which defines the term "firm resettlement," a concept that, under the regulations, becomes relevant once refugee status has been determined (App. 100a).

JURISDICTION

The court of appeals had jurisdiction under 8 U.S.C. § 1252. The court of appeals denied the petition for review on October 24, 2006. App. 1a–16a. A timely petition for rehearing *en banc* was denied on November 27, 2006. App. 17a–18a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Introduction and Summary

One of the most fundamental inquiries in an asylum case is the applicant's "nationality." A person may only claim refugee status and entitlement to asylum from a country where she is a national. In several recent cases, including this one, the courts of appeals have assessed an applicant's nationality under the INA. This petition asks the Court to resolve a conflict between the Fifth Circuit's approach in this case and the Seventh Circuit's approach to the definition of "nationality" under the INA.

The INA authorizes the Attorney General to grant asylum only to persons who meet the definition of "refugee" established by 8 U.S.C. § 1101(a)(42)(A). "Refugee" status in turn, is determined by reference to the person's country of nationality, or if the person has no nationality, her coun-

try of last habitual residence. *See* 8 U.S.C. § 1101(a)(42)(A) (2006) (App. 85a–86a). Once nationality or last habitual residence is determined, refugee status depends on whether the applicant has a well-founded fear of persecution in such country of nationality or last habitual residence. If so, that person satisfies the definition of "refugee," and the general rule is that all refugees are entitled to asylum, unless a specific statutory exception applies. *Dhoumo v. BIA*, 416 F.3d 172, 174–75 (2d Cir. 2005) (holding that the threshold issue in an asylum determination is the applicant's nationality because only a person who has a well-founded fear of persecution in his country of nationality meets the definition of "refugee"). These exceptions include the "firm resettlement" exception, which disqualifies a "refugee" from asylum if that person "entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement . . . ." *See* 8 C.F.R. § 208.15 (2006) (*Appendix* 100a).

In this case, the Fifth Circuit declared that petitioner Senait Kidane Tesfamichael ("Senait") was not a "national" of Ethiopia, the country of her and her parents' birth, for purposes of determining whether she is a "refugee." The Fifth Circuit based this conclusion on the fact that Ethiopia stripped her of her citizenship and expelled her from the country (because she is of Eritrean ancestry). App. 6a–9a. Thus, the Fifth Circuit determined that, as a matter of law, an asylum applicant may *never* be a national of, and thus a refugee from, a country that has stripped her of her citizen-ship.

This decision is directly contrary to decisions of the Seventh Circuit that have allowed asylum applicants stripped of their citizenship to assert that they are "nationals" of that country for purposes of determining whether they are "refugees" under 8 U.S.C. § 1101(a)(42)(A). *See Haile v. Gonzales*, 421 F.3d 493, 495–96 (7th Cir. 2005) (remand-

ing to the BIA for consideration of whether Ethiopians of Eritrean heritage who were stripped of their citizenship by Ethiopia were entitled to asylum); *Giday v. Gonzales*, 434 F.3d 543, 552–54, 556 (7th Cir. 2006) (remanding to the BIA for consideration of whether an Eritrean of Ethiopian heritage stripped of her Eritrean citizenship by the Eritrean government had suffered past persecution as a result of her threatened deportation); *see also Ouda v. INS*, 324 F.3d 445, 52–53 (6th Cir. 2003) (hold-ing that asylum applicant, a stateless Palestinian born in Kuwait, was not precluded from seeking asylum from Kuwait, her "last habitual residence," by the mere fact that Kuwait had expelled her and would not allow her to return to the country).

The Fifth Circuit did not offer any statutory or regulatory justification for its refusal to consider Senait to be a national of Ethiopia—the country of her birth and permanent residence until she was expelled by the Ethiopian government solely on account of her ethnicity in 2000. Accordingly, this case presents a fundamental question regarding the term "nationality," as it is applied in every asylum case.

B. Petitioners' Background

Senait and Dawit Tessema-Damte ("Dawit") (collectively, "petitioners") are a married couple. [1] Together, Senait and Dawit seek asylum in the United States based on Ethiopia's treatment of its citizens of Eritrean heritage. Dawit is Ethiopian. Senait was born in Ethiopia to Ethiopian parents of Eritrean ethnicity, raised in Ethiopia, educated in Ethiopia, and lived until 2000 in Ethiopia. In 1998, the Ethiopian government began to strip Ethiopians of Eritrean heritage of their citizenship and to expel them forcibly from Ethiopia. One court has described this systemic expulsion as "a

[1] Because Dawit and Senait are married, a grant of asylum for one spouse would entitle the other spouse to asylum in the United States as well. 8 U.S.C. § 1158(b)(3)(A) (2006).

program of denationalization and deportation" that "is in fact a particularly acute form of persecution." *Haile*, 421 F.3d at 496.

When the Ethiopian government began this program, Senait and Dawit feared that they would be separated. They attempted to flee Ethiopia together in 1998, but were caught, arrested, and imprisoned. Dawit was charged with the crime of "smuggling Eritreans" and held in prison for about a month where he was interrogated and accused of betraying Ethiopia. After his release, Dawit secured Senait's release from prison. Fearing imprisonment, Dawit then fled Ethiopia, intending to send for Senait later.

Beginning in 1998, Senait's family was expelled piecemeal from Ethiopia. In 2000, Senait was captured by Ethiopian soldiers and forcibly sent to Eritrea. She was not given Eritrean citizenship; rather, she was classified by the Eritrean government as an "Ethiopian refugee." Dawit eventually secured a visa for Senait to join him in South Africa. Although she sought an exit visa, Senait was not allowed to leave Eritrea. So Senait was smuggled out of Eritrea, and eventually she rejoined Dawit in South Africa. Dawit and Senait subsequently came to the U.S. and sought asylum.

C. Ethiopia's Expulsion of Ethiopians of Eritrean Heritage, Including Senait, From Ethiopia

In 1952, the United Nations federated the territory of Eritrea with Ethiopia. Then, in the early 1960s, Ethiopia dissolved the federation and annexed Eritrea as its province. A conflict ensued between the government of Ethiopia and the Eritrean factions that sought independence. After the overthrow of the Marxist Mengistu Haile Mariam regime in 1991, the new Ethiopian government permitted a national referendum in approximately 1993 to determine whether Eritrea should become independent. Ethiopian citizens of Eritrean heritage were allowed to vote in this referendum. *See* App. 1a–3a

(describing the historical record based on the evidence presented by petitioners at their asylum hearing); *see also generally Haile*, 421 F.3d at 494–95. The result of the referendum was the creation of Eritrea as an independent nation in May 1993. App. 2a.

Senait was born and raised in Addis Ababa, Ethiopia. She lived in Addis Ababa with Dawit, who is ethnically Ethiopian. Senait and Dawit were married in 1997. Senait's family also lived in Addis Ababa. Her parents, who were ethnically Eritrean, were Ethiopian citizens. In 1992, Senait filled out a registration card for the Eritrean referendum election and voted in the referendum. Senait was unaware that Ethiopia later would deem the mere act of voting in the referendum as a declaration that she was "Eritrean," and not "Ethiopian," and would use this as grounds for expelling her from the country. App. 53a, 65a–66a. Years later, when Senait attempted to renew her Ethiopian identity card, she was told that she was Eritrean, and that she would not be permitted to renew her Ethiopian identification card. App. 53a.

Beginning in 1998, conflict flared along the Ethiopian-Eritrean border. Ethiopia responded by launching a vast campaign in which it forcibly removed Ethiopians of Eritrean heritage, like Senait and her family, as well as Eritrean nationals who were legally present in Ethiopia. In *Haile*, where the aliens were Ethiopians of Eritrean descent like Senait, the Seventh Circuit commented that this was a period "marked by the arrest and deportation from Ethiopia of thousands of ethnic Eritreans." 421 F.3d at 494. Amnesty International has estimated the number of ethnically Eritrean individuals stripped of Ethiopian citizenship and deported at around 70,000. There was no due process associated with the expulsions. Indeed, it is well-documented that Ethiopian authorities psychologically tortured ethnically Eritrean families by deporting entire families, one person at a time. "Deportees" were forced to stay in detention camps and often lost most of their personal property. People of Eritrean

heritage living in Ethiopia, like Senait, were labeled the "Jews of Africa."

1. Fearing Separation, Senait and Dawit Attempt to Flee Ethiopia

When the deportations began in June 1998, Senait and Dawit, feared that Senait would be removed to Eritrea. Fearing separation, they attempted to flee Ethiopia together. Near the Kenyan border, however, their bus was stopped and the passengers were asked by the police for identification. Senait had nothing to show them because, as noted above, the Ethiopian authorities refused to reissue her Ethiopian identification card after she voted in the referendum for Eritrean independence. App. 3a. The police then asked for Senait's name, ands upon hearing it, they knew she was of Eritrean heritage and took her from the bus. Dawit followed her and told the police that he was her husband. The police then took them both to the police station and separated them. App. 3a; App. 43a–44a, 47a.

The Ethiopian authorities accused Senait of being an escaped Eritrean soldier and constantly interrogated and insulted her. App. 54a–55a. Dawit was accused of betraying Ethiopia and smuggling Eritreans. App. 3a; App. 44a–46a. Both Senait and Dawit were imprisoned. App. 54a–55a. Eventually, Dawit met someone in jail who was able to contact his mother. App. 45a. Dawit's mother secured his release from jail, after he had been there approximately one month. Dawit thereafter secured Senait's release. App. 3a; App. 45a–46a.

Two weeks after his release from jail, fearing that he would be imprisoned for "smuggling Eritreans," i.e., his wife Senait, Dawit left Ethiopia with a plan to send for Senait as soon as possible. App. 3a; App. 47a–48a. After a brief stay in Kenya, Dawit wound up in South Africa, where he remained until 2003. App. 3a.

2. Senait is Expelled to Eritrea as an Ethiopian Refugee

Beginning in 1998, Ethiopian authorities deported Senait's family to Eritrea one-by-one. "At various times in 1998 and 1999, members of Senait's family were taken by Ethiopian police, harassed, and sent to Eritrea." Senait was the last of her family members to be taken. App. 3a–4a, 3a n. 3. In 2000, she was taken in the middle of the night to a detention camp in Ethiopia where she spent three days without food or water. The police then loaded the detainees onto buses and drove them to a point near the Eritrean border. The detainees were forced to walk single-file for about nine kilometers through a field ridden with land mines to cross the border into Eritrea. App. 3a–4a; App. 56a–60a. Upon arrival, Senait was reunited with part of her family in Eritrea. App. 3a–4a.

When Senait arrived in Eritrea, she received an identification document that she was told to carry with her at all times. The document explicitly identified her as a refugee. App. 61a–62a, 65a. The outside jacket of the document reads "Eritrean Refugee Relief Commission." *Id.* at 61a–62a. Because she was a refugee, Senait also was denied an exit visa from the country. App. 4a.

In 2002, Dawit finally was able to obtain a visa for Senait to join him in South Africa. Senait, denied an exit visa by Eritrea, was smuggled out of the country. Senait traveled through Sudan and Swaziland before reuniting with Dawit in South Africa. App. 4a. Senait and Dawit lived together in South Africa for a year. After Senait was violently attacked by a group of men, the couple decided to leave South Africa. They traveled through Cuba, Nicaragua, Guatemala, and Mexico before arriving in the United States in March 2004. *Id.*

D. Senait's and Dawit's Asylum Claims

1. The Immigration Judge and the BIA Deny Senait's and Dawit's Asylum Applications

Before the Immigration Judge and the BIA, Senait and Dawit each brought individual claims for asylum, as well as a joint claim based on their marital status. Dawit argued that he was entitled to asylum because his arrest and imprisonment in Ethiopia amounted to past persecution, creating a presumption of a well-founded fear of persecution in Ethiopia. Senait contended that her forced expulsion from Ethiopia and the stripping of her citizenship by the Ethiopian government was *per se* persecution. She argued that she should not be returned to Eritrea because that country treated her as an "Ethiopian refugee," and that it would be promoting Ethiopia's persecutorial policies to return her to a country that she was forced to live in. *See* App. 6a. Senait and Dawit also asserted that they had a well-founded fear of persecution based on their forced separation if Dawit were to be returned to Ethiopia and Senait to Eritrea. An Immigration Judge ("IJ") denied Petitioners' asylum applications, and they appealed.

A single judge of the BIA dismissed Senait and Dawit's appeal. The BIA determined that Dawit's arrest and imprisonment in Ethiopia amounted to prosecution for a criminal act, not persecution. App. 38a–39a. Regarding Senait, the BIA determined that she was ineligible for asylum because she was "firmly resettled" in Eritrea pursuant to 8 C.F.R. § 208.15. App. 37a–38a. "Firm resettlement" is an exception to the general rule that refugees are entitled to asylum. *See* 8 C.F.R. § 208.15 (App. 100a); 8 U.S.C. § 1158(b)(2)(A)(iv) (2006) (App. 91a–92a). This exception applies if "prior to arrival in the United States, [the applicant] entered into another country with, or while in that country received, an offer of permanent residence status, citizenship, or some other type of permanent resettlement . . . ." 8 C.F.R. § 208.15 (App. 100a). Underlying firm resettlement is the notion that a

person who meets the definition of refugee is not eligible for asylum because she has found and accepted safety in a country other than her country of nationality or last habitual residence. *See* 8 C.F.R. § 208.15 (App. 100a). The BIA went on to declare that "[h]owever unfair, Ethiopia has the right to define its citizenship; *the respondent is now a citizen of Eritrea and will not be returned to Ethiopia.*" App. 37a (emphasis added). *But see Haile*, 421 F.3d at 495 ("The IJ also considered the petitioners' claim that they had been or would be stripped of their Ethiopian citizenship, but concluded that such treatment would not amount to persecution because a country has a right to determine who is or is not a citizen. This reasoning is problematic—it fails to acknowledge the fundamental distinction between *denying* someone citizenship and *divesting* someone of citizenship." (emphasis in original)).

For the BIA to reach the question of whether Senait was firmly resettled in Eritrea, the BIA previously must have concluded that Senait met the definition of refugee (because under the relevant regulation the issue of "firm resettlement" only arises once refugee status has been established). Moreover, because the BIA found that Senait was firmly resettled in Eritrea the BIA necessarily must only have concluded that Senait was a refugee with respect to a country *other than* Eritrea—meaning, she met the definition of "refugee" with respect to Ethiopia.

2. The Fifth Circuit Holds That Senait and Dawit Have a "Significant Likelihood Of Success on the Merits" of Their Asylum Claims, and Grants a Stay of Removal

In a published decision granting petitioners a stay of removal, the Fifth Circuit found that both petitioners demonstrated a likelihood of success on the merits. *See* App. 31a–34a. Although this was a preliminary finding, the court of appeals rejected the conclusion that Senait was "firmly resettled" in Eritrea. App. 32a–33a). The panel stated:

> The board found that she was not entitled to asylum based on any persecution in Ethiopia, for she had firmly resettled in Eritrea. To the contrary, the evidence appears to be that she had no intention of ever remaining in Eritrea and only stayed there so long as was necessary to arrange onward travel. In point of fact, she entered Eritrea only because she was forcibly deported there . . . and was thereafter denied the ability to exit by the Eritrean government even though she had obtained a visa to enter South Africa.

App. 32a.

The panel also preliminarily accepted Dawit's claim that the criminal charge against him ("smuggling Eritreans") amounted to persecution based on race, political belief, and membership in a social group, *i.e.*, an inter-ethnic couple:

> Though it may be a close question, there is a strong argument that prosecution for the crime of smuggling an Eritrean, especially where the Eritrean in question is one's wife from whom one would otherwise be forcibly separated by a war zone, is persecution based on race, political belief, and membership in a social group.

App. 33a.

3. The Fifth Circuit Denies Senait's and Dawit's Petition on the Merits

A different panel of the Fifth Circuit denied Senait's and Dawit's petition on the merits, in another published decision (App. 1a-16a).

Regarding Dawit's asylum claims, the Fifth Circuit affirmed the BIA's conclusion that it was not persecution under the INA for Ethiopia to prosecute Dawit for attempting to smuggle his Eritrean wife out of Ethiopia:

> And as to the smuggling charge, when two countries are at war, it is not invariably persecution for each sovereign to control the travel of persons it believes may harbor sympathy for the enemy or who might flee the country to fight on the other side.

App. 12a.

Regarding Senait's claims, the Fifth Circuit did *not* affirm the BIA's erroneous determination that Senait was firmly resettled in Eritrea. As the earlier panel had recognized, Senait was never offered citizenship or permanent resident status by the Eritrear government; rather, she was teated as a refugee throughout the time she was in Eritrea. The merit's panel therefore did not attempt to salvage the BIA's rationale for its decision. Instead, the court declared, (App. 6a-7a) that Senait was not an Ethiopian refugee at all. The court reached this conclusion on its own, even though neither the DHS, the Immigration Judge, the BIA, or even the Fifth Circuit panel that granted petitioner's stay motion questioned whether Senait was an Ethiopian refugee; rather, all assumed that she was.

Once the court of appeals determined that the BIA's rationale was deficient, the court should have granted the petition and remanded the case to the BIA. This Court has held that "a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in

agency hands" and that "[t]his principle has obvious importance in the immigration context." *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002). In *Orlando Ventura*, this Court reasoned that:

> Within broad limits, the law entrusts the agency to make the basic asylum eligibility decision here in question. In such circumstances "judicial judgment cannot be made to do service for an administrative judgment." Nor can an "appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency. A court of appeals "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." Rather, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."

Id. at 16 (citations omitted) (alternations in original);[2] *see also Gonzales v. Thomas*, 126 S. Ct. 1613, 1615 (2006) (per curiam) (reversing court of appeals and holding the court of appeals was required to remand case to the BIA if the agency had failed to determine an issue necessary to asylum claim).

The court of appeals here took a different route. It elected to consider for itself whether Senait could qualify as an Ethiopian refugee. The court correctly observed that under the INA "aliens who seek asylum must meet the definition of 'refugee.'" App. 6a. The INA defines a refugee as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person

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[2] Other circuits properly have remanded asylum cases to the BIA where, on appeal, the court of appeals has determioned that the BIA (or the IJ) failed to make an explicit finding on the key issue of nationality. *See Dhuomo*, 416 F.3d at 174–75 (reversing and remanding to BIA where no finding of nationality was made); *Wangchuck v. DHS*, 448 F.3d. 524, 529 (2d Cir. 2006) (holding same).

> last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (App. 85a–86a).

The Fifth Circuit then stated that "the BIA adjudicated [Senait's] asylum claim with reference to Eritrea," and "[i]f the BIA's decision to use Eritrea as Senait's test country is supported by substantial evidence, any persecution that Senait allegedly faced in Ethiopia is irrelevant under the statute." App. 7a. This was not accurate. As explained above, the BIA ruled that Senait was *firmly resettled* in Eritrea, which presupposed that she was a refugee from a country *other than* Eritrea.

The court of appeals then searched the record for evidence supporting a (non-existent) finding that Senait was an Eritrean national. App. 6a-8a. The court asserted that "Senait has never argued that she is still an Ethiopian national as she was divested of Ethiopian citizen-ship." App. 7a. The court noted that Senait had filled in Eritrea as her "Present Nationality (Citizenship)" on her asylum application and declared that "[t]he BIA's implicit reliance on Senait's concession that she is not an Ethiopian national is hard to criticize." App. 7a–8a. The court, however, ignored two very important details. First, Senait has *also* filled in Ethiopianas her "Nationality at Birth" on her asylum application. App. 70a. Second, and more importantly, Senait's nationality was never an issue of dispute before the IJ, BIA, or the stay panel because the facts of her treatment in Ethiopia were undisputed and unmistakable. Accordingly, the IJ, BIA, and stay panel accepted these facts and recognized her as a refugee despite what she may have written in a single blank on an administrative form.

Even if Senait is *not* an Eritrean "national," the court continued, she must be considered a stateless person whose asylum claim must be decided by reference to the country in which she last habitually resided:

> If Senait is a national of Eritrea, her asylum claim must be decided through Eritrea. If Senait is not a national of Eritrea, her asylum claims must be decided through the country where she last habitually resided. That country turns out also to be Eritrea.
>
> By finding that Senait was firmly resettled in Eritrea, the BIA implicitly determined that Senait's last habitual residence was Eritrea, or, in any event, not Ethiopia.

App. 9a, 9a n. 10. Neither the Immigration Judge nor the BIA considered Senait's "last habitual residence." The phrase does not appear anywhere in the lengthy written record of this case prior to the court of appeals' decision.[3]

Then, using Eritrea, as the one and only "test country" for purposes of analyzing Senait's asylum claims, the Fifth Circuit concluded that Senait failed to establish the requisite well-founded fear of persecution if returned to Eritrea. App. 9a–10a.

The practical result of the Fifth Circuit's decision is that Senait and Dawit will be separated. Dawit will be returned to Ethiopia. Senait will be returned to Eritrea—a country she was involuntarily delivered to by the Ethiopian authorities, "that she had no intention of ever remaining in," and where she stayed only "so long as was necessary to arrange onward travel." App. 33a. The Fifth Circuit never reached the issue, but the record shows that Dawit cannot go to Eritrea to be

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[3] "Last habitual residence" is either a question of fact, *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1294 (11th Cir. 2001), or a mixed question of law and fact that can only be adjudicated "by both determining the facts of the case and deciding what the applicable law means." *See Paripovic v. Gonzales*, 418 F.3d 240, 243 (3d Cir. 2005).

with Senait (such a suggestion "amounts to a kind of insanity") and Senait cannot return to Ethiopia to be with Dawit. App. 34a.

REASONS FOR GRANTING THE WRIT

The INA permits the Attorney General to grant asylum only to persons who meet the definition of "refugee" established by 8 U.S.C. § 1101(a)(42)(A). Under the INA, a refugee is defined as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (App. 85a–86a).

Thus, whether a person is a "refugee" turns on the threshold issue of the applicant's country of nationality, or if she has no nationality, her country of last habitual residence. Hence, whether courts and the agency correctly interpret the term "nationality," as it was intended to be defined and applied under the INA' is essential to the just application of the INA in all asylum cases.[4]

This case presents an important issue concerning the "nationality" for INA purposes of a person who has been stripped of her citizenship by her home country due to her

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[4] The INA was enacted by the United States in accordance with the nation's obligations under the United Nations Convention and Protocol Relating to the Status of Refugees. *See* H.R. REP. CONF. REP No. 96-781, *reprinted in* 1980 U.S.C.C.A.N. 160, 160 (providing explanatory information regarding the "Definition of Refugee").

ethnic background. The courts of appeals have divided on this question and it warrants review by this court because of the centrality of the "nationality" determination in all asylum cases.

The Second Circuit's decision in *Dhoumo* illustrates the centrality of the determination of nationality. Dhoumo was born in India to two Tibetan refugee parents and raised in a Tibetan refugee camp in India. *Dhoumo*, 416 F.3d at 173. Tibet is now a part of the People's Republic of China. *Id.* Seeking asylum in the United States Dhoumo argued that he was not a national or citizen of India and that he was eligible for asylum because he was a national of China and had a fear of persecution in China. *Id.* The Immigration Judge denied Dhoumo's claims, without making any finding as to his nationality. *Id.* at 174. The BIA summarily affirmed. The Second Circuit reversed, holding that it was error for the IJ and the BIA to ignore the threshold issue of determining Dhoumo's nationality before assessing his eligibility for asylum:

> Thus, under the plain language of the statute, an alien who has a nationality is generally eligible for asylum if she has a well-founded fear of persecution in her country of nationality, regardless of where she was living before coming to the United States, and regardless of whether the government seeks to remove her to some other country. The fact that the country of removal, as opposed to the country of nationality, is not one in which the alien fears persecution may be relevant at the stage of determining eligibility, if at all, not to whether the alien is a "refugee," but to whether one of the relevant defined exceptions applies to the general rule that refugees are eligible for asylum.

Id. at 174–75. *See also Wangchuck v. DHS*, 448 F.3d. 524, 529 (2d Cir. 2006) (holding that the BIA erred because, it failed to make the threshold determination of petitioner's nationality).

Here, by contrast, the court of appeals chose to make its own assessment of Senait's nationality even though the agency itself treated Senait as an Ethiopian regugee. And the court created a definition of "nationality" under the INA that effectively precludes an alien from seeking asylum from a country that stripped her of her citizenship and expelled her from her home. Under the Fifth Circuit's definition of "nationality," an applicant who is subject to one of the most acute forms of persecution—denationalization and expulsion from one's home country—cannot seek asylum here based on that conduct, because she cannot claim to be a "national" of the country that expelled her. The Fifth Circuit's interpretation of "nationality" is incorrect as a matter of law, as cases from other circuits demonstrate.

A rational and plain meaning interpretation of 8 U.S.C. § 1101(a)(42)(A) requires that the term "nationality" permits an asylum applicant to assert that she is a "national" of the country that has stripped her of her citizenship. This is particularly true where it is the act of stripping the person of her citizenship that forms the underlying basis for her asylum claim. Indeed, Senait's nationality as an Ethiopian is the lynchpin to her asylum claim in that it directs the agency and the reviewing court to evaluate her treatment in Ethiopia, not Eritrea. The Fifth Circuit's conclusion that Senait's asylum claims can only be considered by reference to Eritrea not only conflicts with decisions of other circuits but is inconsistent with the intended meaning of "nationality" under the INA.

A. The Sixth and Seventh Circuits Correctly Allow a Person to Claim That She is a National of the Country That Stripped Her of Her Citizenship

Unlike the Fifth Circuit, the Seventh Circuit has allowed asylum applicants to assert that they meet the definition of "refugee" as a "national" of a country that stripped them of their citizenship. Accordingly, rather than determining

"nationality" as the Fifth Circuit did in this case, the Seventh Circuit has allowed individuals like Senait to argue before IJs and the BIA that they meet the definition of "refugee" as a "national" of the country that stripped them of their citizenship. This Court should grant review to resolve this conflict and establish the correct definition of "nationality."

In *Haile*, the Seventh Circuit dealt with asylum claims of people like Senait: the petitioners were born in Ethiopia, were Ethiopians of Eritrean descent, and had never been to Eritrea. *Haile*, 421 F.3d at 494–95. One petitioner was stripped of her Ethiopian citizenship, while another feared that this would happen if she was returned to Ethiopia, if it had not already occurred in his absence from the country. *Id.* Unlike Senait, neither petitioner suffered actual forcible expulsion from Ethiopia because both petitioners fled before they could be deported to Eritrea. *Id.* Although they were stripped or contended they would be stripped of their Ethiopian citizenship, both the BIA and the Seventh Circuit allowed the petitioners to assert that they met the definition of "refugee" because they were "nationals" of Ethiopia. *Id.* at 495–96 (reasoning that "the petitioners were considered citizens of Ethiopia before the war's outbreak," meaning before Ethiopians of Eritrean heritage were stripped of their citizenships). Indeed, the Seventh Circuit reversed the BIA, not because the court had considered the petitioners Ethiopian nationals, but rather because the BIA concluded that "denationalization could never amount to persecution." *Id.* at 496. Finding that "a program of denationalization and deportation is in fact a particularly acute form of persecution," *id.* at 496, the Seventh Circuit remanded the cases to the BIA to determine whether it was "persecution for the Ethiopian government to divest the petitioners of their citizenship based on their ethnicity." *Id.* at 496–97.

Similarly, in *Giday* the Seventh Circuit remanded an asylum claim of an applicant who was of Ethiopian heritage but had

lived her entire life in Eritrea. In Eritrea, the government took the applicant into custody, placed her in a detention facility for individuals of Ethiopian heritage who were waiting forcible deportation, and stripped her of her Eritrean citizenship. *Giday*, 424 F.3d at 546–47. The IJ found that she failed to establish that she had suffered past persecution or that she had a well-founded fear of persecution if returned to Eritrea. *Id.* at 554. The Seventh Circuit reversed and remanded, finding that the applicant should be allowed to contend, on remand, that her threatened deportation and loss of citizenship was persecution under the INA. *Id.* at 555–56.

Thus, the Seventh Circuit interprets "nationality" and "refugee" with direct reference to the claim of persecution asserted by the asylum applicant—although the aliens in *Haile* and *Giday* may have been stripped of their citizenship, they were still "nationals" of their former countries for purposes of analyzing their claim that their denationalization *was* the act of persecution that entitled them to asylum. The fact that Senait was actually deported from Ethiopia, whereas the aliens in *Haile* escaped Ethiopia prior to their expulsion, should not be determinative for purposes of addressing her "nationality" under the INA. But, under the Fifth Circuit's decision, it is. Indeed, according to the Fifth Circuit's reasoning, the *Haile* petitioners' claims were analyzed with regard to Ethiopia *because* they were not deported. *See* App. 8a, 8a n. 8 ("Both petitioners in *Haile* could use Ethiopia as their test country, whereas the BIA found that Senait could not. Neither of the petitioners in *Haile* had actually been deported from Ethiopia.")[5] The Fifth Circuit's interpretation of the term "nationality" under the INA thus delivers a logically-flawed result that the *Haile* court's inter-pretation does not: Ethiopia's deportation of Senait strips her of her

[5] And to reiterate, the BIA made no such finding (*see* App. 35a-39a). Rather, it correctly treated Senait as a Ethiopian national but then concluded incorrectly that she was "firmly resettled" in Eritrea.

nationality and thereby precludes her from seeking asylum from that country.

In a similar context, involving the assessment of an alien's "last habitual residence," the Sixth Circuit has adopted a rule that parallels the Seventh Circuit's rule for determining nationality. *Ouda*, 324 F.3d at 452-53. "Last habitual residence," and how this term is defined, is analogous to "nationality" because under 8 U.S.C. § 1101(a)(42)(A), "last habitual residence" is the touchstone for assessing refugee status of an applicant who has no nationality. *See* 8 U.S.C. § 1101(a)(42)(A) (App. 85a–86a). In *Ouda* the petitioner was a stateless Palestinian born in Kuwait. *Ouda*, 324 F.3d at 447. Petitioner and her family were harassed and abused by the Kuwaiti government because of their Palestinian ethnicity. *Id.* at 448. Ultimately, petitioner and her family were ordered by the Kuwaiti government to leave the country by a certain date. *Id.* After petitioner's brother was abducted, demeaned, and beaten, petitioner and her family fled Kuwait for Bulgaria, where they lived for some time. In Bulgaria, petitioner and her family were unable to apply for citizenship and, again, harassed because of their ethnicity. *Id.* at 449. The IJ denied petitioner's asylum claim, finding that Bulgaria was her country of last habitual residence and that "therefore, the focus of her asylum claim must be on Bulgaria." *Id.* On appeal, petitioner argued that Bulgaria was not her last habitual residence, and that she had established eligibility for asylum in relation to Kuwait. *Id.* at 449–50. The BIA rejected this claim, finding, *inter alia*, that petitioner could not use Kuwait as her last habitual residence because "Kuwait will not accept her." *Id.* at 450.

The Sixth Circuit granted the petition and remanded to the BIA, concluding that despite her expulsion from Kuwait and the country's refusal to accept her back, the petitioner could assert that Kuwait was her country of last habitual residence. The court first held that "the BIA erred as a matter of law that

Ouda cannot request asylum from Kuwait because she cannot be deported there." *Id.* at 453. Indeed, the Sixth Circuit found "no support for the proposition that an asylum applicant is precluded from seeking asylum in the United States should it prove to be the case that the country from which she seeks asylum will not take her back." *Id.* at 452. The court stated that a country's refusal to accept a person is, in fact, evidence of persecution. *Id.* at 453 (citing *Al Jajjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001), *Faddoul v. INS*, 37 F.3d 185 (5th Cir. 1994)). Then, analyzing petitioner's claim of past persecution in Kuwait, the court concluded that "[t]he mere fact that the Oudas were ordered by the government to leave Kuwait because they were perceived enemies of their country is sufficient alone to establish past persecution." *Id.* at 454. Like the Seventh Circuit in *Haile*, the Sixth Circuit in *Ouda* adopted a definition of "last habitual residence" with direct reference to the claim of persecution asserted by the asylum applicant—that her expulsion from her country of habitual residence, Kuwait, was the persecution that established her refugee status.

In stark contrast to the approach taken by the Sixth and Seventh Circuits, the Fifth Circuit in this case has adopted a definition of "nationality" that effectively precludes a person from claiming refugee status—and, thus, obtaining asylum—with respect to a country that has stripped her of her citizenship and thrown her out of the only country she ever called home. The Fifth Circuit's approach ignores the very basis for Senait's asylum claim—her loss of rights in, and expulsion from, the country of her birth, Ethiopia.

B. Senait is an Ethiopian National Under the INA

The Fifth Circuit's interpretation of the term "national" in the INA finds no support in the statute, either.

The INA defines a "national" as a "person owing permanent allegiance to a state". 8 U.S.C. § 1101(a)(21) (2006).

According to a majority of appellate courts, a person may become a national of the United States in only two ways: by birth and by completing the naturalization process. *Omolo v. Gonzales*, 452 F.3d 404, 408 (5th Cir. 2006) (citing numerous cases from the First, Second, Third, Ninth and Eleventh Circuits). In addition, the Restatement (Third) of Foreign Relations requires a "genuine link" between an individual and the country conferring nationality. It states that, "[l]aws that confer nationality on grounds of birth in a state's territory (ius soli) or of birth to parents who are nationals (ius sanguinis) are universally accepted as genuine links." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 211 cmt. n. c (2006).

In *Dhoumo*, 416 F.3d 172, the central issue was the failure of the administrative courts to determine, the "nationality" of the asylum applicant, who was born in India to two Tibetan refugee parents. The Second Circuit looked to the definition of "national" established by 8 U.S.C. § 1101(a)(21), as well as the Restatement (Third) of Foreign Relations, and found that the petitioner "presented substantial argument and evidence supporting his Chinese nationality to both the IJ and the BIA." *Id.* at 175. This evidence included the fact that his parents were Chinese nationals by virtue of the fact that they were born in a territory, Tibet, that is now and was at the time they fled, recognized as a part of China. Remanding for consideration by the BIA whether the petitioner was a Chinese national, as he asserted, the Second Circuit said, "[b]irth in a state's territory and descent from a national both 'are universally accepted'" as genuine links to a country establishing one's nationality. *Id.*

Senait was born in Addis Ababa, Ethiopia and spent a majority of her life there. She was born to parents who both, at the time of her birth, were Ethiopian citizens. These facts alone establish that Senait is an Ethiopian national under the generally accepted understanding of the term. Moreover, the United Nations Handbook on Procedures and Criteria for

Determining Refugee Status (hereinafter the "Handbook") also leads to the conclusion that Senait is an Ethiopian national. The Handbook interprets the 1951 U.N. Convention Relating to the Status of Refugees and the 1967 U.N. Protocol Relating to the Status of Refugees. *See* UNITED NATIONS HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (hereinafter "U.N. HANDBOOK"), HCP/IP/4/Eng/REV.1 (revised Jan., 1992), Forward. Much of the language in the INA, particularly regarding the definition of a "refugee," mirrors that found in the U.N. Conventions that the Handbook interprets. This Court has relied upon the anaylsis set forth in the Handbook to interpret the term "refugee" under the INA, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438–40 (1987). For instance, the Handbook defines a "refugee" as a person who:

> Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> U.N.HANDBOOK, Part I, ch. 2 A(a) (defining "refugee" under Article 1A(2) of the 1951 U.N. Convention Relating to the Status of Regugees).

Although the Handbook is not binding, courts refer to it in assessing asylum claims. *See, e.g. Zhang v. Gonzales*, 426 F.3d 540, 546 (2d Cir. 2005). Indeed, more than 140 countries, including the United States are parties to at least one of the two major legal instruments that serve as the foundation of the Handbook.

In its discussion, the Handbook states, "[i]n the majority of cases, refugees retain the nationality of their country of origin." U.N. HANDBOOK at B(4)(a)(87). The Handbook also notes that "[p]rotection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution." U.N. HANDBOOK at B(5)(98). Senait is an Ethiopian national under this standard as well.

The Fifth Circuit's approach, by contrast, ignores that Senait was born in Ethiopia to Ethiopian citizens and was an Ethiopian citizen herself until Ethiopia took that citizenship away from her. The court's rationale, if accepted, would effectively suborn the Ethiopian government's decision to strip Senait of her Ethiopian citizenship by relying on the Ethiopian government's conduct to deny her refugee status under the INA. By concluding that Senait is not an Ethiopian national, the Fifth Circuit's definition of "national" validates Ethiopia's systematic ethnic cleansing and violations of international human rights policy. The Universal Declaration of Human Rights, Article 15, states that no person should be "arbitrarily deprived of his nationality." *Universal Declaration of Human Rights*, G.A. Res. 217A, at Article 15, U.N. GAOR, 3d Sess., 1st plen mtg., U.N. Doc. A/810 (Dec. 12, 1948). The term "arbitrarily" encompasses racial, sexual, and other forms of discrimination. RESTATEMENT (THIRD) FOREIGN RELATIONS § 211, reporter's n. 4 (2006). The Fifth Circuit's approach directly conflicts with Article 15, as well as the U.N. Conventions that the U.S. has adopted and incorporated into the INA.

Senait is an Ethiopian national based on both the INA and universally accepted international law. She was persecuted in Ethiopia via systematic discrimination and eventual deportation. The Fifth Circuit erred substantially in deciding that her asylum application could be evaluated only by reference to Eritrea.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 26, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Oct. 24, 2006]

Docket Number 04-61180

SENAIT KIDANE TESFAMICHAEL;
DAWIT TESSAMA-DAMTE
Petitioners,

v.

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL
Respondent.

Before JONES, *Chief Judge*, and WIENER and PRADO, *Circuit Judges*.

EDITH H. JONES, *Chief Judge*:

Petitioners seek review of the decision of the Board of Immigration Appeals ("BIA") denying them asylum, individually and as a married couple, from Eritrea and Ethiopia. Finding no reversible error, we DENY the petition for review.

BACKGROUND

Comprising Ethiopia, Eritrea, Somalia, and Sudan, the region known as the Horn of Africa has a troubled history. After World War II, Italy relinquished control of its African colonies, including Eritrea. In 1952, the United Nations federated Eritrea with Ethiopia. In the early 1960s, Ethiopia dissolved the federation and annexed Eritrea as a province. Factions in the Eritrean province began clamoring for independence almost immediately and fought a brutal thirty-year war with the Ethiopian government. These factions later joined forces with Ethiopian groups seeking political reform

to secure the overthrow of the Marxist regime of Mengistu Haile Mariam in 1991.

Once the Mengistu regime was overthrown, Ethiopian leaders permitted a national referendum on Eritrean independence in 1993. Registration to vote in the referendum was tied to verification of Eritrean nationality through a detailed form with information about a voter's religious affiliation, parents and grandparents, and references from three Eritrean citizens. More than one million voters, living in over forty different countries, selected independence by a huge majority. Eritrea, supported by the new Ethiopian government, declared independence in May 1993.

Relations between Ethiopia and its new neighbor proved cordial. After several years, however, border disputes led to war in May 1998. At the outbreak of war, the legal status of the approximately 75,000 voters in the Eritrean independence election who continued to live in Ethiopia remained uncertain, and in June 1998 Ethiopia began forcibly removing to Eritrea people who had voted in the election. The "deportations" occurred without due process. The deportees were often forced to stay in detention camps briefly, and Ethiopia regularly scheduled the deportations piecemeal to break up families.[1]

Petitioner Senait Kidane Tesfamichael and her family were among those forcibly removed from Ethiopia. Senait's parents were originally from the Eritrean region, but Senait was born and lived in Addis Ababa, Ethiopia, until the deportations. At her asylum hearing, Senait testified credibly that she heard of the deportations in 1998 and feared removal.

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[1] This generalized background information comes from sources in the Administrative Record, which included, *inter alia*, country reports, a question and answer series prepared by the Department of State, and documents prepared by the UN Refugee Agency, the Human Rights Watch, and Amnesty International.

Shortly after the deportations began, Senait and her Ethiopian husband, Petitioner Dawit Tessema–Damte, attempted to escape out of Ethiopia, possibly to Kenya. Their escape plans were foiled, however. On a bus near the Kenyan border, police asked the passengers for identification. Senait could not produce any, as authorities had stripped her of her Ethiopian ID following her vote in the Eritrean referendum.[2] Dawit intervened on Senait's behalf, but his intervention led to both his and Senait's arrest and detention.

As he credibly testified, Dawit spent a month in jail for the purported crime of "smuggling Eritrean." Until his mother secured his release through a bond, he slept in one room with up to forty men, received little food, and saw other detainees with bruises caused, he believed, by beatings. While in jail, Dawit was interrogated generally once or twice a day, for one or two hours, about how many people he had smuggled and how much he charged.

Dawit was able to secure Senait's release one week after his own by bribing officials. Back in Addis Ababa, Dawit was twice stopped by police; both times Dawit cooperated and was released. Fearing reprisal for his help to Senait, and without reporting to court on the pending smuggling charges, Dawit fled alone to Kenya, then South Africa, where he lived from 1998 to 2003.

Ethiopian authorities found Senait in June 2000 and removed her to Eritrea.[3] Senait testified that she spent three days in a detention center without food or water, then was forced to walk nine kilometers in an area filled with land mines on the way to Eritrea. There, Senait reconnected with

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[2] Senait testified that in 1992, when she filled out the election card in the referendum, she became a citizen of Eritrea.

[3] Senait was the last of her family to be removed from Ethiopia. At various times in 1998 and 1999, members of Senait's family were taken by Ethiopian police, harassed, and sent to Eritrea.

her family and worked part-time at a gas station. She testified that she was occasionally taunted or told to go back to Ethiopia. She also claims that she was denied full Eritrean citizenship and an exit visa, and that she feared military conscription.

In 2002, two years after Senait had been removed to Eritrea, and after the war ended,[4] Dawit sent for her. Without an exit visa, Senait had to be smuggled out of Eritrea. She traveled through Sudan and Swaziland before reuniting with Dawit in South Africa. There, the couple stayed for a year until they were robbed and burglarized, crimes which scared Senait, and they decided to leave. After traveling through Cuba, Nicaragua, Guatemala, and Mexico, the couple arrived in the United States in March 2004.

Senait and Dawit entered the United States without visas, and they conceded removability pursuant to 8 U.S.C. § 1182(a)(6)(A)(I). An Immigration Judge ("IJ") found them ineligible for asylum, withholding of deportation, and relief under the Convention against Torture ("CAT"). A single judge of the BIA affirmed.

DISCUSSION

The Ethiopian-Eritrean conflict precipitated a rash of asylum seekers entering the United States.[5] Although Petitioners are sympathetic victims of this conflict, the BIA and this court must analyze their claims statutorily. If petitioners

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[4] Ethiopia and Eritrea negotiated a peace settlement in December 2000.

[5] See, e.g., *Giday v. Gonzales*, 434 F.3d 543 (7th Cir.2006); *Haile v. Gonzales*, 421 F.3d 493 (7th Cir.2005); *Negeya v. Gonzales*, 417 F.3d 78 (1st Cir.2005); *Fessehaye v. Gonzales*, 414 F.3d 746 (7th Cir.2005); *Nuru v. Gonzales*, 404 F.3d 1207 (9th Cir. 2005); *Begna v. Ashcroft*, 392 F.3d 301 (8th Cir.2004); *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir.2004); *Tolosa v. Ashcroft*, 384 F.3d 906 (7th Cir. 2004).

do not qualify for asylum, the BIA correctly rejected their claims.[6]

This court reviews the BIA's legal conclusions *de novo*. *Girma v. I.N.S*, 283 F.3d 664, 666 (5th Cir.2002); *Lopez-Gomez v. Ashcroft*, 263 F.3d 442, 444 (5th Cir.2001). We will defer to the BIA's interpretation of immigration regulations if the interpretation is reasonable. *Lopez-Gomez*, 263 F.3d at 444. The BIA's factual findings are upheld if supported by substantial evidence, *Long v. Gonzales*, 420 F.3d 516, 519 (5th Cir.2005), that is, unless the evidence is so compelling that no reasonable factfinder could fail to find otherwise. Id.

To qualify for asylum, an alien must be a "refugee." See 8 C.F.R. § 1208.13(a). The Immigration and Naturalization Act defines a refugee as a person unable to return to his or her country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). Past persecution entails harm inflicted on the alien on account of a statutorily enumerated ground by the government or forces that a government is unable or unwilling to control. 8 C.F.R. § 1208.13(b)(1). The alternative asylum ground, a well-founded fear of persecution, results when a reasonable person in the same circumstances would fear persecution if deported. *Jukic v. INS*, 40 F.3d 747, 749 (5th Cir.1994).

In either case, to establish persecution, the alien's "harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life." *Abdel–Masieh v. INS*, 73 F.3d 579, 583 (5th Cir.1996) (quoting *Matter of Laipenieks*,

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[6] Petitioners do not here challenge the denial of their claims for withholding or CAT relief.

18 I & N Dec. 433, 456-57 (BIA 1983) (citations omitted)). Nevertheless, . .

> [i]t does not encompass all treatment that our society regards as unfair, unjust or even unlawful or unconstitutional. If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country—and it seems most unlikely that Congress intended such a result.

Majd v. Gonzales, 446 F.3d 590, 595 (5th Cir.2006) (quoting *Al–Fara v. Gonzales*, 404 F.3d 733, 739 (3d Cir.2005)).

The Petitioners each bring an individual claim for asylum. Additionally, they bring a claim for asylum on the basis that they will be separated if removed to their respective countries. If we find error in the BIA's decision in resolving any of the claims, we must remand, as Senait and Dawit would have derivative claims for relief based on their marriage.[7]

A. Senait's Claim

The BIA held that Senait was (1) a citizen of Eritrea, (2) firmly resettled in Eritrea, and (3) unable to show past persecution or a well-founded fear of persecution if returned to Eritrea.

Senait takes issue with this reasoning and would have us consider her a refugee from Ethiopia based on Ethiopia's forced deportation policy, which sent her to Eritrea. This claim falters under the facts and the plain language of the statute. As was just noted, aliens who seek asylum must meet the definition of a "refugee." *See* 8 U.S.C. § 1208.13(a); *see*

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[7] Although the IJ found that Petitioners did not establish that they were married, the BIA did not make a finding as to the issue of their marriage, instead assuming for purposes of analysis that the couple was married under Ethiopian law. We do the same.

also Eduard v. Ashcroft, 379 F.3d 182, 187 (5th Cir.2004). The statute defines a refugee as including:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, *that country* because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (emphasis added). The statute thus permits an alien to seek asylum from only one "test country": that of the alien's nationality, or, if the alien is stateless, that of the country where the alien last habitually resided. *Cf. Wangchuck v. Dep't of Homeland Sec.*, 448 F.3d 524, 529 (2d Cir.2006) (noting the error in the BIA's assumption that an alien could be eligible for asylum based on a well-founded fear of persecution in either of two countries). In Senait's case, the BIA adjudicated her asylum claim with reference to Eritrea. If the BIA's decision to use Eritrea as Senait's test country is supported by substantial evidence, any persecution that Senait allegedly faced in Ethiopia is irrelevant under the statute.

A "national" is "a person owing permanent allegiance to a state." 8 U.S.C. § 1101(a)(21). Senait has never argued that she is still an Ethiopian national, as she was divested of Ethiopian citizenship. Moreover, in her asylum application, Senait filled in Eritrea as her "Presented Nationality (Citizenship)." "Nationality is a status conferred by a state." *Dhoumo v. BIA*, 416 F.3d 172, 175 (2d Cir.2005); cf. *Paripovic v. Gonzales*, 418 F.3d 240 (3d Cir.2005) (petitioner was rendered stateless by the dissolution of the former Yugo-

slavia). The BIA's implicit reliance on Senait's concession that she is not an Ethiopian national is hard to criticize.[8]

The BIA found that Senait was a citizen of Eritrea and firmly resettled there.[9] Senait argues that she could not have been firmly resettled in Eritrea because, as an Ethiopian deportee, she was not granted the same rights as non-refugee Eritreans. Yet the only thing this argument can do is force Senait's asylum claim into the statelessness rubric: If Senait is a national of Eritrea, her asylum claim must be decided through Eritrea. If Senait is not a national of Eritrea, her asylum claims must be decided through the country where she last habitually resided. That country turns out also to be Eritrea.

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[8] In supplemental briefing, Petitioners cited two recent Seventh Circuit decisions dealing with refugees from Ethiopia and Eritrea, *Giday v. Gonzales*, 434 F.3d 543 (7th Cir.2006), and *Haile v. Gonzales*, 421 F.3d 493 (7th Cir.2005). Were this court to follow it, the Seventh Circuit's decision in *Haile*, noting that it is arguable that "a program of denationalization and deportation is in fact a particularly acute form of persecution," *id.* at 496, would be persuasive evidence that Senait suffered persecution in Ethiopia. Yet that is not the relevant question here: Both petitioners in *Haile* could use Ethiopia as their test country, whereas the BIA found that Senait could not. Neither of the petitioners in *Haile* had actually been deported from Ethiopia, *id.* at 495, and the court remanded in part so the IJ could determine "whether the petitioners are still considered citizens by Ethiopia," *id.* at 496

Giday is similarly distinguishable: The petitioner in *Giday* lived in Eritrea but was ethnically Ethiopian; Eritrea attempted to deport the petitioner because of her Ethiopian heritage. Eritrea remained the test country be cause she had never been to Ethiopia and was not a national there, and because once she escaped Eritrea, the petitioner left for the United States immediately. *Id.* at 547.

[9] 8 U.S.C. § 1158(b)(2)(A)(vi) provides that the Attorney General may not grant asylum to an otherwise eligible refugee if "the alien was firmly resettled in another country prior to arriving in the United States." An alien is firmly resettled if "he or she entered into another country with, or while in that country received, an offer of . . . citizenship. . . ." 8 C.F.R. § 208.15.

By finding that Senait was firmly resettled in Eritrea, the BIA implicitly found that Senait's last habitual residency was Eritrea, or, in any event, not Ethiopia. *Cf. Al Najjar* v. *Ashcroft,* 257 F.3d 1262, 1294 (11th Cir.2001) (approving an implicit finding of "last habitual residence"). Substantial evidence supports such a finding under any plausible definition of last habitual residence.[10]

The immigration law defines "residence" as "the place of general abode," which is a person's "principal, actual dwelling in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). Senait has not lived in Ethiopia since June 2000, and she did not arrive in the United States until March 2004. For more than two years, she lived in Eritrea with her mother, some of her siblings, and, while he was alive, her father. She also was employed as a gas station cashier with Mobil Oil. After living in Eritrea, Senait lived briefly in South Africa with Dawit, but they chose to move away from there.

Significantly, Senait's asylum application indicates that she perceived Eritrea to be her test country. The form asks: "Please list your last address where you lived before coming to the U.S. If this is not the country where you fear persecution, also list the last address *in the country where you fear persecution.*" (Emphasis added). Senait furnished addresses in South Africa and Eritrea; she omitted Ethiopia. Further, when asked if she feared harm if returned to her "home country," she responded by invoking hardships in Eritrea, not Ethiopia.

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[10] The meaning of "last habitual residence" is a question of law reviewed *de novo,* with agency deference when appropriate. *Paripovic,* 418 F.3d at 243. Like the BIA, we need not, and do not, determine the precise contours of the meaning of "last habitual residence." Under any plausible definition of the term, Senait had not last habitually resided in Ethiopia. It is that factual determination that we review for substantial evidence. *See Al Najjar,* 257 F.3d at 1294

These facts belie any notion that Ethiopia is Senait's last habitual residence; the BIA's determination to use Eritrea as her test country is supported by substantial evidence.

Senait next challenges the BIA's decision that she did not suffer past persecution and lacks a reasonable fear of future persecution in Eritrea.[11] Senait argues that (1) the Eritrean government regularly commits human rights violations; (2) the Eritrean government required Senait, unlike "native Eritreans," to carry a card that identified her as an Ethiopian refugee; (3) she was denied an exit visa; (4) she has a "vulnerable social status" as an Ethiopian refugee; and (5) she was "harassed and discriminated against by the Eritrean government." On these points, the BIA explained that Senait's only individualized complaint was "that customers at the gas station where she worked made remarks threatening that those born in Ethiopia should be sent back there," and that "[t]hese incidents and alleged discrimination against Eritreans from Ethiopia fall short of persecution." Further, the BIA noted that there was "no evidence" that Senait "was treated differently than native-born Eritreans by the government."

The BIA's decision is supported by substantial evidence. Senait's fears fall far short of the required "extreme conduct" needed to establish persecution. Her only complaint of individualized harassment stemmed from a few incidents where she was taunted at work. Persecution cannot be based on "mere denigration, harassment, and threats." *Eduard v. Ashcroft*, 379 F.3d 182, 188 (5th Cir.2004); see also id. at 187 n. 4 (persecution "requires more than a few isolated incidents of verbal harassment or intimidation" (quoting *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir.1998))). Petitioners also

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[11] Technically, the petitioners do not argue that Senait suffered persecution in Eritrea, instead attacking only the BIA's finding that Senait was firmly resettled in Eritrea. We will read their briefs liberally, however, and construe their arguments against firm resettlement as arguments that Senait suffered and fears persecution in Eritrea.

point to their expert's affidavit that Eritreans from Ethiopia are treated "harshly," are "unduly discriminated against," and are blamed for hardships. As the expert conceded, however, many Eritrean problems "are undoubtedly effects of the economic hardships caused by the war overall." *Eduard* holds that "[n]either discrimination nor harassment ordinarily amounts to persecution under the INA, even if the conduct amounts to 'morally reprehensible' discrimination on the basis of race or religion." *Id.* at 188. Finally, the fact that Eritrea denied Senait an exit visa does not on this record establish persecution.[12] The totality of the evidence does not compel a conclusion contrary to that of the BIA.

B. Dawit's Claim

Dawit's asylum claim is premised on his arrest, detention, and charge for violating Ethiopia's travel laws by "smuggling Eritreans." These acts, he asserts, amounted to past persecution on account of his social group and imputed political opinions. In providing parameters for the term "persecution," the BIA has stated:

> While punishment of criminal conduct in itself is not persecution, where that punishment entails such things as severe beatings or being sent to a Nazi concentration campi.e., is "excessive or arbitrary"—and is motivated by one of the specified grounds, such punishment would constitute persecution under [immigration laws].

Abdel–Masieh, 73 F.3d at 584 (quoting *Laipenieks*, 18 I & N Dec. at 456-57). In this case, the BIA held that Dawit's punishment "would be prosecution for a criminal act, not persecution."

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[12] Senait testified that, in 2002 when she wanted to leave Eritrea, the Eritrean government denied exit visas to everyone between the ages of eighteen and forty.

Based on the record, substantial evidence supports the BIA determination that Dawit did not experience past persecution. Dawit encountered Ethiopian law enforcement three times. First, he was arrested and detained for a month when he and Senait were stopped at the Kenyan border near the beginning of the Ethiopian–Eritrean border war, and he was charged with smuggling. The detention was under unpleasant and unduly prolonged but not brutal conditions. Later, he was stopped twice in Addis Ababa and his bag was searched. On neither of these latter occasions, however, could Dawit affirm whether the police were aware of the pending criminal charges or were conducting planned surveillance on him.

Not only do these law enforcement encounters fail to rise to the level of physical persecution, *compare Abdel-Masieh*, 73 F.3d at 584, but it is also unclear whether they were motivated by political or social group animus against Dawit. There is no explanation in the record for his being accosted in Addis Ababa. And as to the smuggling charge, when two countries are at war, it is not invariably persecution for each sovereign to control the travel of persons it believes may harbor sympathy for the enemy or who might flee the country to fight on the other side. The background of Dawit's detention, of course, is the forced deportations and denationalization that both Ethiopia and Eritrea carried out against their resident ethnic minority and that other courts have asked the BIA to evaluate for asylum purposes. *See Haile*, 421 F.3d at 494-95. Still, there is no direct connection between his criminal charge and the "ethnic cleansing," while there is an obvious purpose in a country's enforcement of passport and travel laws during wartime.

Dawit argues that he was singled out for prosecution because, when he identified himself as Senait's husband, the authorities "knew his political opinions" and sought to punish him as a sympathizer with Eritreans. These connections are inferences that the BIA was not required to draw. Dawit's

interrogation over the course of his detention seems, on the contrary, to have concerned mundane attributes of smuggling—how many people, how much money—rather than political inquisition.

This court recently held that "[a]sylum protects victims of persecution on account of belief, not conduct." *Mwembie v. Gonzales*, 443 F.3d 405, 414 (5th Cir.2006) (citing cases). The line separating belief from conduct may not always be clearly delineated when based on the existence of criminal charges, but here we are not persuaded that Dawit was persecuted on account of his beliefs or his marriage to an Eritrean.

It follows that, because Dawit's main expressed fear in returning to Ethiopia is his exposure to the outstanding criminal charge, and that charge is not sufficient to show persecution, he has not established a well-founded fear of future persecution. Further, Dawit does not take issue in his appellate brief with the BIA's observation that it is unclear whether he would face further criminal proceedings on return to Ethiopia for events that happened eight years ago. Dawit has not demonstrated that the evidence he offered "was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *INS v. Elias–Zacarias*, 502 U.S. 478, 484-85, 112 S.Ct. 812, 817, 117 L.Ed.2d 38 (1992).

C. The Spousal Separation Claim

Senait and Dawit assert that they are entitled to asylum as a married couple for the persecution they will suffer on account of their membership in a protected social group, that of inter-ethnic married couples. The "persecution" they claim is forced separation, to wit, that Senait cannot live with Dawit in Ethiopia and Dawit allegedly cannot live with Senait in Eritrea. The Board dismissed this claim of persecution, stating that "[t]he cases cited by the respondents regarding the consideration of spousal separation are not relevant to this case. Not every action we would regard as unjust or unlawful amounts to persecution."

The Board's conclusion is correct. There is no legal authority that compels asylum for married couples where deportation could separate them, and the Board found that Senait and Dawit had not in any event proven removal would cause them to be separated. As they did before the Board, Petitioners rely on three cases to support their contention that spousal separation is persecution. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1141 (9th Cir.2004); *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir.2004); *Carrete-Michel v. INS*, 749 F.2d 490, 494 (8th Cir.1984). We agree with the Board that they are all distinguishable. *Kalubi* dealt with discretionary entitlement, as opposed to legal eligibility, for asylum. See 8 U.S.C. § 1158(b)(1)(A) ("Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 444, 107 S.Ct. 1207, 1219, 94 L.Ed.2d 434 (1987) (stating that aliens who "can only show a well-founded fear of persecution are not *entitled* to anything, but are *eligible* for the discretionary relief of asylum"). The BIA denied Kalubi asylum on discretionary grounds because it believed he lacked credibility. The Ninth Circuit reversed, holding, *inter alia*, that if an alien is credible for purposes of eligibility, he cannot be held incredible for purposes of discretionary entitlement. *Kalubi*, 364 F.3d at 1138-39. Also, construing a pertinent regulation, the Ninth Circuit held only that spousal separation is a factor the BIA must consider once it deems an alien eligible for asylum; the court did not hold that spousal separation is related to eligibility.

Similarly, *Carrete-Michel* did not deal with eligibility for asylum, but instead involved a Mexican national who sought suspension of deportation by demonstrating extreme hardship, through his longstanding ties to the United States and the separation he would face from his family. *Carrete-Michel*, 749 F.2d at 492. This finding compelled the Attorney General to suspend deportation under pre-IIRIRA law. *Id.;*

see also 8 U.S.C. § 1254(a)(1) (repealed).[13] *Carrete-Michel* reflects a longstanding immigration policy of favoring aliens who have ties to United States citizens or lawful permanent residents ("LPR"), *see* 8 U.S.C. § 1153(a). This policy is entirely distinct from the definition of persecution under other immigration provisions.

Finally, petitioners rely on *Ma v. Ashcroft*, a case involving a husband's asylum claim based on his wife's forced abortion in China. For this particularized form of persecution, Congress has specifically provided a remedy in 8 U.S.C. § 1101(a)(42)(B). That a wife's forced sterilization is persecution to the husband under this law, *Matter of C–Y–Z*, 21 I. & N. Dec. 915, 917-18, 1997 WL 353222 (BIA 1997), does not mean that a country persecutes a husband by forbidding his wife to live with him in that country.

Although the United States supports marriage and family reunification, it does not follow that because two aliens may not be able to live together in their home countries, they are persecuted. This country denies entry to some foreign nationals who marry a United States citizen, *see* 8 U.S.C. § 1182, and allows the removal of the spouse of a U.S. citizen or LPR under certain conditions, see 8 U.S.C. § 1227. While the BIA may determine that spousal separation, in appropriate circumstances, constitutes persecution, it did not so find here.

The Board found, and the record fully supports, that Dawit could not have been "persecuted" by his wife's expulsion to Eritrea, as he was by that time living in South Africa, had not officially registered their marriage, and was not connected to

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[13] After IIRIRA, an alien can establish cancellation of removal, effectively the same thing as suspension of deportation, with ten years continuous physical presence in the United States, good moral character, lack of certain convictions, and a showing that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child" who is a citizen or lawful permanent resident of the United States. *See* 8 U.S.C. § 1229b(b).

the expulsion. The Board also found that the couple have not proven their inability to live together in Eritrea. The Board cited in support of this finding three facts: (1) Dawit and Senait never inquired officially about the possibility of returning there together; (2) the expert's affidavit "only indicates that there is much resentment against Ethiopians in Eritrea"; and (3) Dawit would have trouble finding employment. The first and third findings are unassailable. The second finding understates the appellants' expert's affidavit, which goes to some length detailing the discrimination that might befall both Senait and Dawit in Eritrea due to lingering prejudice against their ethnically mixed marriage. But predictions of possibilities do not support a well-founded fear of persecution, nor, as we have noted, does discrimination alone amount to persecution. Petitioners have not demonstrated that the Board's findings must be overturned.

CONCLUSION

For the foregoing reasons, the petition for review of the Board's decision is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 27, 2006

MEMORANDUM TO COUNSEL
OR PARTIES LISTED BELOW:

No. 04-61180 Tesfamichael v. Gonzales
USDC No. A97 746 471
A97 746 470

Enclosed is an order entered in this case.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Renee S. McDonough,
RENEE S. MCDONOUGH, Deputy Clerk
504-310-7673

Mr. Brett Michael Schuman
Mr. Eric Warren Marsteller

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Nov. 27, 2006]

No. 04-61180

SENAIT KIDANE TESFAMICHAEL;
DAWIT TESSEMA-DAMTE,
Petitioners,

v.

ALBEPSTO R GONZALES,
U.S. Attorney General,
Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARTNG EN BANC

(Opinion October 24, 2006, 5 Cir., ___, ___F.3d___)

Before JONES, *Chief Judge*, WIENER and PRADO, *Circuit Judges*.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition or Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5" CIR. R. 35) , the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of

one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5" CIR. R. 35) , the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United State Circuit Judge

REHG-7a

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-61180

SENAIT KIDANE TESFAMICHAEL;
DAWIT TESSEMA-DAMTE,
Petitioners,

v.

ALBERTO R. GONZALES,
United States Attorney General,
Respondent.

May 24, 2005

Before DAVIS, SMITH and DENNIS, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

Petitioners Senait Kedane Tesfamichael and Dawit Tessema- Damte, seeking review of their requests for asylum, move this court for a stay of removal pending our consideration, on the merits, of their petition for review of the decision of the Board of Immigration Appeals ("BIA"). We grant the motion for stay.

I.

The petitioners are a married couple seeking asylum in the United States. He, Dawit, is Ethiopian and she, Senait, was born in Ethiopia but is ethnically Eritrean. In the late 1990's, the uneasy situation between Ethiopia and its former province, Eritrea, escalated to war that involved mass deportations by both governments.

When the deportations began in 1998, fearing separation, the petitioners attempted to leave Ethiopia together. Senait, the ethnically Eritrean wife, was not allowed to leave. She lacked the required government-issued documents, which she claims were unavailable to her as an ethnic Eritrean.

When they were caught attempting to flee to Kenya, Dawit was charged with smuggling Eritreans illegally and was released pending trial. Senait was released only after a guard was bribed. Fearing persecution at trial because he was married to an ethnic Eritrean, and after experiencing some police harassment, Dawit fled the country. Senait was then expelled against her will from Ethiopia to Eritrea. Her whole family, save a sister who was allowed to emigrate to the United States via the visa lottery, was also expelled, one person at a time.

After a convoluted series of events including a two year stay in Eritrea for Senait and a brief reunion in South Africa, the two petitioned for refugee status in the United States by claiming past persecution and a well-founded fear of future persecution. The immigration judge ("IJ") and the BIA denied the petition. The government plans to deport Senait to Eritrea and Dawit to Ethiopia. They seek review of the BIA's order and a stay of their removal pending that review.

II.

Before directly addressing the request for a stay, we must determine, importantly, what standard governs that request. Neither the statutory text nor our caselaw provides an obvious guide. Although this court has yet to weigh in on the subject, this question has split the courts of appeals.[1] We now adopt the standard in use by the vast majority of the circuits.

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[1] *See Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305, 123 S.Ct. 1386, 155 L.Ed.2d 301 (2003) (Kennedy, J., denying stay and discussing the divers authorities).

Before 1996, most aliens who were ordered deported were entitled to a stay of their removal order pending review of that order.[2] With the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), however, one who is seeking review of a deportation order must ask the reviewing court for a stay of removal.[3] The statutory provision that repealed the automatic imposition of a stay provides, "Service of the petition on the officer does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." *Id.* All the same, § 242(b)(3)(B) does not specify the standard a court should use in deciding whether to grant such a stay.

According to the government, that standard is found in § 242(f)(2):

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by *clear and convincing evidence* that the entry or execution of such order is prohibited as a matter of law.

INA § 242(f)(2), 8 U.S.C. § 1252(f)(2) (emphasis added). Consequently, the government contends, courts may not issue a stay unless the alien shows the illegality of the removal order by clear and convincing evidence. This approach, although proffered by the government in at least seven circuits, has been rejected by six and embraced in a holding by only one.[4]

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[2] *See* 8 U.S.C. § 1105a(a)(3) (repealed in 1996); *Arevalo v. Ashcroft*, 344 F.3d 1, 6 (1st Cir.2003).

[3] *See* Immigration and Nationality Act ("INA") § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B).

[4] *See Weng v. U.S. Attorney Gen.*, 287 F.3d 1335, 1337 (11th Cir. 2002). But *see Bonhomme-Ardouin v. U.S. Attorney Gen.*, 291 F.3d 1289, 1290 (11th Cir.2002) (Barked, J., concurring) (calling for en banc recon-

The circuits that have rejected the government's position instead have adopted the standard that prevailed in this circuit before the enactment of IIRIRA, when stays were discretionary. In *Ignacio v. INS*, 955 F.2d 295, 299 (5th Cir.1992), we held that the decision whether to grant a discretionary stay of deportation would be based on the familiar four-factor test applied to preliminary injunctions:

> (1) a likelihood of success on the merits; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the [alien] outweighs the harm to the [government] if a stay is not granted; and (4) that the granting of the stay would serve the public interest.

Id. This standard is patently less demanding on petitioners than is the "clear and convincing evidence" standard urged by the government.[5]

As noted above, the Eleventh is the only circuit expressly to hold that § 242(f)(2)'s "clear and convincing evidence" standard has supplanted the traditional preliminary injunction standard when considering requests for temporary stays.[6]

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sideration of *Weng*).

[5] *See Weng*, 287 F.3d at 1337; *Kenyeres*, 538 U.S. at 1305, 123 S.Ct. 1386 (citing *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) ("The 'intermediate standard of clear and convincing evidence' lies 'between a preponderance of the evidence and proof beyond a reasonable doubt'")). The government argues, in summary fashion, that the "clear and convincing evidence" standard found in § 242(f)(2) and adopted by the Eleventh Circuit controls here as well.

Missing from the government's discussion is a detailed refutation of the nuanced and reasonably persuasive arguments relied on by the other circuits that have rejected the position. The government's cursory discussion of the controlling standard is more than can be said for the petitioners' brief, however, which assumes that the old, four-factor test is still in use and does not even address the applicability of § 242(f)(2).

[6] In *dictum*, a panel of the Fourth Circuit indicated it would agree with the government's position. *See Ngarurih v. Ashcroft*, 371 F.3d 182, 195

That court, in *Weng*, concluded that IIRIRA had amended the standard for aliens to satisfy before federal courts could temporarily stay their deportation.

Analyzing the statutory framework as a whole, the *Weng* court first noted that § 242(f)(1) precludes courts from enjoining, class-wide, the operation of certain sections of the INA. Section 242(f)(2) goes on to explain that no court shall "enjoin" the removal of any individual alien except on a showing of clear and convincing evidence that the removal is unlawful.[7] The court noted that "enjoin" means "'[t]o require; command; positively direct. To require a person by writ of injunction, to perform, or to abstain or desist from, some act.'" *Weng*, 287 F.3d at 1338 (quoting BLACK'S LAW DICTIONARY 529 (6th ed.1990)). In comparison, "stay" is defined as

> "[a] stopping; the act of arresting a judicial proceeding by the order of a court. Also that which holds, restrains, or supports. A stay is a suspension of the case or some designated proceedings within it. It is a kind of injunction with which a court freezes its proceedings at a particular point . . . ."

Id. (emphasis added by *Weng* court).

The *Weng* court thus concluded that the "definitions and common usage" of the words "enjoin" and "stay" demonstrate that "the plain meaning of enjoin includes the grant of a stay." *Id.* The court also found that the interchangeability of the two words is further supported by the frequent conflation of the two in other courts' phraseology. *Id.* (citing, *inter alia, NLRB v. Nash-Finch Co.*, 404 U.S. 138, 139-41, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971)).

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n. 13 (4th Cir.2004).

[7] As Judge Easterbrook puts it, "Subsection (f)(1) forbids injunctive class actions and subsection (f)(2) sets a high standard for injunctive relief at retail." *Hor v. Gonzales*, 400 F.3d 482, 483 (7th Cir.2005).

Observing that before the enactment of IIRIRA courts considered requests for discretionary stays under the same standard as that employed for requests for injunctive relief,[8] the *Weng* court reasoned that Congress's passage of IIRIRA was informed by knowledge of this practice. Accordingly, *Weng* asserts that Congress's "reference to the power to 'enjoin' should be read as encompassing stays of removal as well." *Id.* at 1339.

The belief that Congress's knowledge of current standards somehow broadens the definition of "enjoin" is a *non sequitur*. Nevertheless, the *Weng* court's first conclusion, that the plain meaning of "enjoin" as used in § 242(f)(2) encompasses courts' issuances of temporary stays, is persuasive. Other courts that have wrestled with this question, however, have employed equally compelling reasoning that runs counter to the government's position.

Faced with this dilemma, the First, Second, Third, Sixth, Seventh, and Ninth Circuits have held that the IIRIRA does not impose the "clear and convincing evidence" standard on requests for temporary stays.[9] In the most recent iteration of that position, the Seventh Circuit held that § 242(f)(2) does not supplant the traditional standard governing the issuance of stays. *Hor*, 400 F.3d at 483. Writing for the court, Judge Easterbrook observed that, as a practical matter, the adoption of the standard urged by the government would render stays of deportation almost impossible to obtain.

Section 242(f)(2), according to the government, precludes

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[8] *See, e.g., Ignacio*, 955 F.2d at 299.

[9] *See Hor*, 400 F.3d at 485; *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir.2004); *Arevalo v. Ashcroft*, 344 F.3d 1, 8-9 (1st Cir.2003); *Mohammed v. Reno*, 309 F.3d 95, 99-100 (2d Cir.2002); *Bejjani v. INS*, 271 F.3d 670, 68789 (6th Cir.2001); *Andreiu v. Ashcroft*, 253 F.3d 477, 480-83 (9th Cir.2001) (en banc).

the issuance of a stay unless the alien demonstrates by clear and convincing evidence that the deportation order "is prohibited by law." Such a showing, however, likely would be impossible for anyone but a United States citizen or the holder of "a visa of unquestioned validity." *Id.* Aliens who contend that the IJ's and BIA's denial of relief was unsupported by substantial evidence, however, would be unable to make such a showing of illegality and thus would have no hope of obtaining a stay. Such a conclusion would run counter to § 242(b)(3)(B)'s allowance for such stays by court order. *Id.*

This observation certainly does not conclusively demonstrate that the government's position is wrong. Absent certain exceptional circumstances, *e.g.*, an absurd result, we will not ignore the plain language of a statute. If the Eleventh Circuit is correct, therefore, that the plain language of § 242(0(2) demands the result the government urges, the virtual impossibility that aliens like petitioners will receive a stay will not counsel against that interpretation—for such a result is not necessarily absurd.

A far more powerful refutation of the Eleventh Circuit's textual analysis concerns *Weng*'s conclusion that the word "enjoin" is unambiguously synonymous with "stay." As the Seventh Circuit acknowledges in *Hor*, 400 F.3d at 484, "[c]ertainly there is a functional overlap" of the two—both can "stop an agency in its tracks." Nonetheless, history and usage counsel that the two words carry different legal meanings, particularly where federal agencies are involved. Though an injunction is relief obtained through independent litigation and directed at a particular party, not a tribunal, a stay is a mechanism intrinsic to judicial review. *Id.*

A court of appeals, just as it may stay a district court's order, may stay an agency's decision where the agency is the forum of initial decisionmaking and the "initial judicial tribunal is a court of appeals." *Id.* This historical distinction is reflected in rule 18 of the Federal Rules of Appellate Proce-

dure, which recognizes the peculiar nature of "stays" pending appellate review of agency decisions. FED.R.APP.P. 18. It is noteworthy that rule 18 nowhere uses the word "enjoin" or "injunction" but maintains the linguistic distinction by discussing "stays"—a peculiar procedural medium. *Id.*

Maintaining the formalistic distinction in vocabulary, Judge Easterbrook explains, is necessary to empower Congress to phrase legislation effectively. *Hor*, 400 F.3d at 484. Conflating the terms "injunctions" and "stays" "would impoverish the language and make the legislative task more difficult." *Id.* Strict adherence, on the other hand, to historical and practical differences in meanings makes the drafting of precise legislation more easily achievable.

> By contrast, treating a subsection that mentions injunctions but not stays as covering both would force Congress to add provisos each time it sought to regulate one but not the other. Once a legal community develops a stable nomenclature, it is best to apply it mechanically so that no one is taken unawares, and so that drafting can be uncluttered by provisos. . . .
>
> . . . [A]pplying established legal distinctions gives Congress a formulary: it can achieve one result by using a particular word or phrase, a different result with a different phrase.

Id. at 484-85. Interpreting the word "enjoin" narrowly so as to exclude "stays" is advisable "[n]ot because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting." *Reno v. Am.-Arab Anti–Discrimination Committee*, 525 U.S. 471, 482, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (interpreting a different subsection of § 242).

There are other reasons for not assuming that subsection (f)(2)'s use of "enjoin" was meant to include stays. Subsection (b)(3)(B)'s abolition of the automatic stay specifically in-

dicates that stays may still be available. INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B). This provision, consequently, would have been the natural place to locate an amendment to the operative standard governing their issuance, but no such standard is found.

Rather than merely indicating that "such stays shall be issued when the standard laid out in subsection (f)(2) has been met," the provision is silent on the matter. Such silence, however, can be deafening.[10] Hesitating to make such an interpretive leap as urged by the government is consistent with the Supreme Court's admonition that § 242 should be construed narrowly. *See Am.-Arab Anti–Discrimination Committee*, 525 U.S. at 482, 119 S.Ct. 936.

Not only does subsection (b)(3)(B) not reference subsection (f)(2)'s supposedly higher applicable standard, but the two provisions employ different vocabulary. That is, although the Weng court is correct that a dictionary definition of "enjoin" can encompass a "stay," Congress chose to use different words in different sections. When Congress wished to legislate on the issue of stays, as it did when it repealed the imposition of the automatic stay pending appeal in subsection (b)(3)(B), it used the word "stay." As the Second Circuit observed, "If Congress wanted to apply a heightened standards to a stay pending appeal, it would likely have used the word `stay' in subsection 242(f)(2) instead of 'enjoin'. . . ." *Mohammed*, 309 F.3d at 99.

The practical consequence of adopting the government's position also counsels in favor of rejecting that position. Imposing on petitioners the "clear and convincing evidence" standard of subsection (f)(2) would, as Judge Selya described

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[10] *See Hor*, 400 F.3d at 484; *Arevalo*, 344 F.3d at 8 (citing *In re Qualitech Steel Corp.*, 327 F.3d 537, 548 (7th Cir.2003) (counseling that courts should not "interpolate limitations from one statutory section into a different section when the legislature" did not so direct)).

it, "necessitate full deliberation on the merits of the underlying case and, in the bargain, require the alien to carry a burden of proof *higher* than she would have to carry on the merits." *Arevalo*, 344 F.3d at 8.

The instant petition for review, far from requiring clear and convincing evidence of illegality to be successful, will be granted should this court ultimately decide, on a *de novo* merits review, that the BIA erred in its legal conclusions. *See Lopez–Gomez v. Ashcroft*, 263 F.3d 442, 444 (5th Cir.2001). Convinced that Congress could not have intended this "Kafkaesque" result, the First Circuit held that subsection (f)(2) does not apply to requests for temporary stays. *Id.* Although we do not necessarily agree with Judge Selya's contention that such a result renders the statute "absurd," it is strong evidence that the intent of Congress was otherwise. *Id.*

Similarly, the Seventh Circuit highlighted another potential anomaly that would flow from the adoption of the government's position. *See Hor*, 400 F.3d at 485. In contrast to the potential mootness effects that pre-IIRIRA deportations yielded, current law allows a petition for review to be considered even after an alien's departure. The alien may then return to the United States should he prevail on appeal. *See id.* In cases such as the present one, however, where petitioners are seeking asylum based on a well-founded fear of persecution, "[t]he ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim." *Id.*

Reading the relevant statutory provisions as the government contends yields just this sort of peril. The results of such a construction are peculiar, at best, but "[t]here's nothing absurd about reading [§ 242(b)(3)(B)] to permit courts to avert such harms." *Id.*

It is axiomatic that courts should strive to give operative meaning to every word in a statute. *See, e.g., Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209, 117 S.Ct. 660,

136 L.Ed.2d 644 (1997). Accordingly, some courts have highlighted the fact that although § 242(f)(2) employs the word "enjoin," the preceding subsection discusses courts' abilities to "enjoin or restrain." *Andreiu*, 253 F.3d at 480 (quoting INA § 242(f)(1), 8 U.S.C. § 1252(f)(1)). Consequently, goes the argument, adopting the government's position that subsection (f)(2)'s use of "enjoin" encompasses all related phrases such as "stay" would reduce Congress's use of "restrain" in the previous subsection to mere surplusage.

Although that particular "mere surplusage" argument is not especially convincing (and it would be stronger if the prior subsection used "enjoin or *stay*" instead of "enjoin or restrain"), a related argument is more powerful. The Ninth Circuit en banc court noted that if § 242(f)(2) truly had the effect that the government advances, all of subsection (b)(3)(B) would be surplusage. *See Andreiu*, 253 F.3d at 481. "If [§ 242(f)(2)] clearly means that courts can only issue stays of deportation upon a showing that the order was 'prohibited a a matter of law,' there would be no need to state in [§ 242(b)(3)(B)] that stays are no automatic." *Id.*

With due respect to the Eleventh Cir cuit, the better reading of § 242 of the INA is that subsection 242(f)(2)'s "clear and convincing evidence" standard doe, not apply to requests for temporary stay of removal pending appellate review. In stead, the traditional test, adopted by this court in *Ignacio*, 955 F.2d at 299, remains in force and governs the instant dispute With the rule of decision so clarified, we now turn to the merits of petitioners' re quest for a stay.

III.

As we have said, in the absence o legislative guidance to the contrary, re quests for temporary stays of removal an considered in light of the degree to which four factors can be shown:

(1) a likelihood of success on the merits; (2) that ir-

> reparable harm would occur if a stay is not granted; (3) that the potential harm to the [alien] outweighs the harm to the [government] if a stay is no granted; and (4) that the granting of the stay would serve the public interest.

Id. The petitioners' motion papers make strong argument in favor of granting the stay. These showings are balanced only by the government's cursory refutation. Stays, like other forms of preliminary relief, are considered without reaching a fu] adjudication on the merits.[11] They are, in fact, usually issued or denied without eve] full briefing on the merits.[12] At this incipient stage, petitioners have made out a strong enough case to warrant relief in the form of a temporary stay of removal pending our review on the merits of their petition.

Although four factors are relevant to determining entitlement to a stay, the first (likelihood of success on the merits) is arguably the most important. *See Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir.1998). Because the instant petitioners can show a significant likelihood of success on the merits, therefore, their case is a particularly appropriate one in which to issue a stay.

The IJ and the BIA ruled that petitioners did not present documentary proof of Ethiopian law that would have supported their assertion that Ethiopian law recognizes their marriage despite the fact that it has never been formalized. Although they submitted copies of provisions of the Ethiopian constitution to support their position, the IJ held that such evidence was insufficient to demonstrate marriage because the petitioners did "not show[ ] that they are experts in Ethiopian law." The BIA parroted this line of reasoning when

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[11] See 11A CHARLES ALAN WRIGHT, ARTHUR MILLER AND MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2947, at 122 (2d ed.2003).

[12] That is all the more reason that the supposed requirement that a petitioner show entitlement to relief by "clear and convincing evidence" would be anomalous.

it concluded that Dawit would not likely face future persecution because his marriage to Senait was not registered with the Ethiopian government.

There does not seem to be any support in the law, however, for the conclusion that the petitioners' testimony, coupled with copies of the operative sections of the Ethiopian constitution, is not sufficient to demonstrate the veracity of their marriage. This is especially so given the IJ's explicit recognition of the credibility of the petitioners' testimony.[13] There appears to be no tenet of law (to which any party directs the court's attention) that requires any sort of expertise to testify to this fact. Consequently, the BIA's conclusion that Dawit was not subject to persecution by Senait's deportation because, in part, their marriage was not registered, was likely error.

An even more important point on which the IJ and BIA seem to have erred involves Senait's alleged resettlement in Eritrea. The board found that she was not entitled to asylum based on any persecution in Ethiopia, for she had firmly resettled in Eritrea. To the contrary, the evidence appears to be that she had no intention of ever remaining in Eritrea and only stayed there so long as was necessary to arrange onward travel. In point of fact, she entered Eritrea only because she was forcibly deported there (after being arrested for trying to enter Kenya with Dawit), and was thereafter denied the ability to exit by the Eritrean government even though she had obtained a visa to enter South Africa (where she would eventually reunite with Dawit).

The case the IJ and BIA cite in support of the "firmly resettled" conclusion does little to advance this finding. *See Mussie v. INS*, 172 F.3d 329, 331 (4th Cir.1999). Although

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[13] See IJ opinion at 21 (calling their testimony "specific, forthright, internally consistent and essentially consistent with the testimony of the other. . . .").

the BIA's regulations state that where an applicant for asylum entered a country as a necessary consequence of her persecution and remained only as long as was necessary to arrange onward travel, the case to which the BIA cites involved a situation in which there was no colorable argument that these requirements had been met. *See* 8 C.F.R. § 208.15; *Mussie*, 172 F.3d at 331. In contrast to the present case, where it is at least a close question whether Senait remained only so long as was necessary to arrange onward travel (although not that close given the evidence that the Eritrean government denied her ability to exit and reunite with Dawit), *Mussie* involved an Ethiopian asylum seeker who had spent over six years in Germany and did not attempt to leave until she was harassed by neo-Nazis. *Massie*, 172 F.3d at 331.

The BIA further concluded that Dawit had not suffered past persecution, because his fear of imprisonment in Ethiopia for attempting to smuggle Senait out of the country was the result of legitimate application of Ethiopian travel laws and not the result of one of the five bases of persecution from which refugees are protected: race, political beliefs, religion, nationality, and membership in a particular social group. 8 U.S.C. § 1101(a)(42)(A); *Zhao v. Gonzales*, 404 F.3d 295, 304 (5th Cir.2005). Though it may be a close question, there is a strong argument that prosecution for the crime of smuggling an Eritrean, especially where the Eritrean in question is one's wife from whom one would otherwise be forcibly separated by a war zone, is persecution based on race, political belief, and membership in a social group.

Courts have consistently held that legitimate application of a country's travel laws does not constitute persecution. Nevertheless, those cases have never involved a peculiar application of travel laws such that the violative behavior was caused by the patent persecution of the ethnicity of the asylum-seekers wife. It is not a compelled conclusion that under the statute Dawit faces "persecution," as defined by the

statute, for his violation of the travel laws. It is obvious, however, that the cases on which the BIA concluded that it was not persecution are distinguishable on their facts and do not stand for the proposition that asylum-seekers positioned as Dawit is are unable to claim persecution.

There is also a serious question as to the propriety of the BIA's conclusion that Dawit likely could emigrate to Eritrea to be with Senait (who has already been forcibly deported from Ethiopia, so her emigration there is obviously not possible). As the petitioners' expert put it, such a suggestion "amounts to a kind of insanity." At this early stage in our proceedings, it is sufficient to say that the BIA's conclusion to the contrary is questionable and demonstrates that there exists a significant likelihood that Senait and Dawit will prevail on the merits of their claims.

Again, this is not an exhaustive analysis of the merits of the petitioners' claims; such an analysis would not be appropriate at this initial stage without the benefit of full briefing and further review of the record and pertinent authorities. The petitioners, however, have demonstrated a significant likelihood of success on the merits. That likelihood, coupled with the extraordinary likelihood of irreparable harm the petitioners face if deported (in the form of forced separation and likely persecution), and the public interest in having the immigration laws applied correctly and evenhandedly, justifies the issuance of a stay of the order of removal pending resolution of the merits of the petition for review.

The motion for stay of removal pending review is GRANTED. We emphasize, however, that our comments on the merits are preliminary. Another panel of this court will review anew the facts and the law for a purpose entirely different from the reason for which we have examined them. Nothing in this opinion should be interpreted as an indication that petitioners can, will, or should prevail in ultimately forestalling removal and gaining asylum.

APPENDIX D

[Filed DEC. 1, 2004]

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Files: A97 746 470 - Los Fresnos Date:
A97 746 471

In re: SENAIT KIDANE TESFAMICHAEL
DAWIT TESSEMA-DAMTE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Megan K. Rosichan, Esquire

ON BEHALF OF DHS:
Mark R. Whitworth Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)]—Present without being admitted or paroled (both respondents)

APPLICATION: Asylum; withholding of removal; Convention Against Torture

On July 15, 2004, an Immigration Judge found the respondents removable pursuant to section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), and denied the respondents' applications for asylum under section 208(b) of the Act, 8 U.S.C. § 1158(b), withholding of removal under section 241(b) of the Act, 8 U.S.C. § 1231(b), and protection under the Convention Against Torture (CAT), 8 C.F.R. §§ 1208.16-18. The respondents appealed. The request for an appeal fee waiver is granted. The appeal will be dismissed.

The respondents are a 28-year-old female native of Ethiopia and citizen of Eritrea ("Senait") and a 29year-old male native and citizen of Ethiopia ("Dawit").[1] They entered the United States on or about March 27, 2004; the Notice to Appear was issued on March 31, 2004. Following the hearing, the Immigration Judge determined that the respondents had not established eligibility for asylum, withholding of removal, protection under the CAT or voluntary departure and denied relief. The Immigration Judge found the male respondent had not suffered any past persecution and has no well-founded fear of persecution in Ethiopia or Eritrea. He found the female respondent was firmly resettled in Eritrea; therefore, she would not be eligible for asylum, even if the circumstances of her expulsion from Ethiopia constitute past persecution. 8 C.F.R. § 1208.15. He found no evidence the female respondent has a well-founded fear of persecution in Eritrea He found they were not eligible for voluntary departure because they had not been in the United States for a year prior to the service of the Notice to Appear. Section 240B(b)(1) of the Act; 8 C.F.R. § 1240.26.

According to the respondents, when the Ethiopian government began to expel those of Eritrean descent from Ethiopia, they attempted to flee the country. Their bus was stopped at the border in Kenya, and Senait was arrested because she had no passport or ID card (Tr. at 126). Dawit also was imprisoned for a month and bonded out. Senait was released about 2 weeks later, reportedly after payment of a bribe. The male respondent was accused of smuggling an Eritrean. The male respondent left Ethiopia a few weeks later and went to South Africa. He worked there selling items on the street. The female respondent was expelled from Ethiopia to Eritrea involuntarily in June 2000. Her family had already been

[1] The respondents testified they began to live together in 1997 and that they consider themselves to be married (Tr. at 63, 65, 119, 121). They did not state that they had performed any rites of a customary marriage.

expelled to Eritrea, except for one sister who came to the United States on a diversity visa; Senait joined her parents and four siblings in Eritrea. She left Eritrea in November 2002 without an exit visa to be with the male respondent in South Africa. They both applied for asylum there, but received no decision before they left for the United States in 2004. They left because there had been an attempted robbery in their home and Senait was injured. She claims past persecution in Ethiopia and a well-founded fear of persecution in Eritrea. The male respondent claims a well-founded fear of persecution in Ethiopia and Eritrea. Senait claims a well-founded fear of persecution in Eritrea because of her Ethiopian identity and her marriage to an Ethiopian. Dawit claims a well-founded fear of persecution in Ethiopia *as a* defector and supporter of Eritrea

We find the decision of the Immigration Judge is in conformity with the law and that he did not ignore evidence simply because he did not reach the desired conclusion. The background information indicates that the Ethiopian government since 1998 has deported tens of thousands of ethnic Eritreans to Eritrea without notice or due process, regardless of where they were born. Most individuals have had to abandon their property. Certainly, Eritreans were deported from Ethiopia under circumstances which violated their due process rights. This experience was for many dangerous, cruel, and traumatic. The immediate cause of these measures taken by Ethiopia was a border dispute with its neighbor and former province. Eritrea has removed Ethiopians as well. However unfair, Ethiopia has the right to define its citizenship; the respondent is now a citizen of Eritrea and will not be returned to Ethiopia.

The Immigration Judge also correctly found she had firmly resettled in Eritrea. *Mussie v. INS*, 172 F.3d 329 (4th Cir. 1999). The respondent's testimony regarding what happened to her in Eritrea does not establish that she suffered past

persecution in Eritrea or that she has a well-founded fear of future persecution in Eritrea. She only complained that customers at the gas station where she worked made remarks threatening that those born in Ethiopia should be sent back there. These incidents and alleged discrimination against Eritreans from Ethiopia fall short of persecution. There is no evidence she was treated differently than native-born Eritreans by the government.[2] Moreover, it is not clear that her husband would not be allowed in Eritrea. The Department of State, *Country Reports on Human Rights Practices, Eritrea—2002* (March 31, 2003) 7, 10 (*Country Reports*) (Exh. 5) indicates that many of the Ethiopians removed went willingly because they had lost their jobs or suffered other hardships; moreover, there are still *as many as* 20,000 Ethiopians living in Eritrea and they have been allowed to renew their residence cards.

The male respondent did not demonstrate that he was persecuted in Ethiopia. He was arrested on suspicion of smuggling and failed to appear for his hearing. He admits that he and Senait were violating the law. If he were tried and sent to prison, it would be prosecution for a criminal act, not persecution. *Barreto-Claro v. Attorney General*, 275 F.3d 1334 (1 Cir. 2001); *see Chanco v. INS*, 82 F.3d 298 (9th Cir. 1996). In addition, it is not clear that he would be tried for this minor incident which happened over 6 years ago. Moreover, the expulsion of his wife from Ethiopia could not be persecution to Dawit, in part, because he was living in South Africa at the time, they had never registered their

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[2] Senait allegedly fears being drafted, but gave no testimony to that effect. In any case, the government has the right to require military service of its citizens and to deny exit visas to those who have not fulfilled that obligation. *Sevoian v. Ashcroft*, 290 F.3d 166 (3rd Cir. 2002) There are reports that women in the military have been sexually harassed or abused, but the respondent presented no evidence that the abuse is systemic or that she would become a victim.

marriage with the government, and he was not directly involved. Thus, we find no past persecution or well-founded fear of persecution in Ethiopia. The alleged inability of Dawit to live in Eritrea with his wife was not proven by any of the testimony or background information. He and his wife never made any inquiry as to whether he could live with her and the affidavit only indicates that there is much resentment against Ethiopians in Eritrea and he would have trouble finding employment. *Medhin v. Ashcroft*, 350 F.3d 685 (7th Cir. 2003); *Woldemeskel v. INS*, 257 F. 3d 1185 (10th Cir. 2001). The cases cited by the respondents regarding the consideration of spousal separation are not relevant to this case. Not every action we would regard as unjust or unlawful amounts to persecution. *Fatin v. INS*, 12 F.3d. 1233 (3rd Cir. 1993). Indeed, in view of the cessation of hostilities between Ethiopia and Eritrea in 2000, we find no well-founded fear of persecution.

Although the respondents may have a subjective fear of harm, the respondents have failed to demonstrate that they have a well-founded fear of persecution if returned to Ethiopia and Eritrea, respectively. Accordingly, they have failed to establish eligibility for asylum. We also find the respondents have not met the stringent standard of clear probability of persecution required for withholding of removal pursuant to section 241(b) of the Act and for protection under the Convention Against Torture. 8 C.F.R. § 1208.16(c)(2).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

File Nos.: A 97 746 470-471

Matters of: SENAIT KIDANE TESFAMICHAEL, DAWIT TESSEMA-DAMTE,
Respondents.

Before HOWARD ACHTSAM, Immigration Judge

Date: July 14, 2004 Place: Los Fresnos, Texas

Transcribed by DEPOSITION SERVICES, INC. At Rockville, Maryland

Official Interpreter: Hakim Mohamed

Language: Amharic

Appearances:

For the Department of Homeland Security:	For the Respondents:
Lessa Whatmough, Esquire	Brett Schuman, Esquire Kim Sullivan, Esquire Courtney Landis, law student Megan Rosichan, law student Jessica Scheppmann, law student

JUDGE FOR THE RECORD

This is Immigration Court at the Port Isabel Detention Center in Los Fresnos, Texas. The date is July 14, 2004. This is Immigration Judge Howard Achtsam. This is a removal hearing being held jointly today for two respondents. These

cases have been consolidated for the purpose of hearing. The cases of Senait Kidane Tesfamichael, A 97 746 470. And the other case is the case of Dawit Tessema-Damte, A 97 746 471. Both respondents are present. They are both detained at this facility. They are both appearing today with counsel and representatives. There is an attorney, a Brett Shuman, who is a licensed attorney in California who is present. Then there are three law students, Megan Rosichan, spelled R-O-S-I-C-H-A-N, Courtney Landis, and Jessica Sheppmann. And I'll spell the names of the counsel for the record. Brett Sh is B-R-E-T-T, new word S-C-H-U-M-A-N; Megan, M-E-G-A-N, Rosichan, R-O-S-I-C-H-A-N; Courtney, C-O-U-R-TN-E-Y, Landis, L-A-N-D-I-S; Jessica, J-E-S-S-I-C-A, Scheppmann, S-C-H-E-P-P-M-A-N-N. And the, the law students have—actually Mr. Schuman, on behalf of the law students, has made a motion to allow them to appear before the Court. The Department of Homeland Security is represented today by its Assistant Chief Counsel Lessa Whatmough, spelled L-E-S-S-A, new word W-H-A-T-M-0-U-G-H. We do have an interpreter today present telephonically to interpret in the Amharic language.

JUDGE TO INTERPRETER

[37] Q. To the interpreter, would you state your name and spell your name for the record.

A. Akim Mohamed. H-A-K-I-M. Mohamed, M-O-H-A-M-E-D.

Q. And please stand up and raise your right hand to take the oath as the interpreter. Do you swear that you're competent to interpret from English to Amharic and Amharic to English and that you'll interpret accurately and correctly in these proceedings?

A. I do.

Q. Thank you. Please be seated.

JUDGE FOR THE RECORD

We'll go off the record to check the tape recorder.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

We're back on the record. The Court stated that the interpreter was present telephonically. That is not the case. The interpreter is present in court at this time to interpret for today's hearing. Normally we do have interpreters appearing telephonically and that is what I stated; however, the interpreter is present in court at this time.

This case is scheduled today for a hearing on the merits of the respondents's applications for asylum and withholding of removal and, in the alternative, voluntary departure. And the Court is ready to proceed with the cases

* * * *

Q. Why didn't you think you could live in Eritrea?

A. The Eritrean government also expelling the Ethiopians. Because of that, the Ethiopian also cannot go and live in Eritrea.

Q. So why was it that you and Senait decided to leave the country?

A. We don't want to be separate.

Q. Where was it that you and Senait planned to go?

A. Kenya.

Q. Did you tell your family that you were going to Kenya?

A. No, I did not tell them.

Q. And why didn't you tell them?

A. I don't want them to worry my family and at the same time I was renting my house and started living on my own. Because of that, I don't want to bother them.

Q. Were you afraid when you were going to Kenya?

A. First, no.

Q. How was it that you traveled to Kenya?

A. First I went by bus.

Q. Did you know anybody else on the bus?

A. That first time, no.

Q. Was Senait with you on the bus?

A. That first time she was.

Q. Okay. So we're talking about the first time you [79] went to Kenya, Dawit. Just so he understands.

A. Okay.

Q. When you were on that bus with Senait, about how many other people if you know were on the bus?

A. About 45.

Q. What happened while you were on the bus, Dawit?

A. We passed a lot of small town and small village from Addis, the city called Hagra Mariam.

MS. ROSICHAN TO JUDGE

Q. Do you want me to spell that, Your Honor?

A. Yes, please.

Q. Or actually I don't know—oh yeah, here it is. H-A-G-R-A, second word Mariam, M-A-R-I-A-M.

A. Thank you.

MS. ROSICHAN TO MR. TESSEMA-DAMTE

Q. Dawit, you can continue, please.

A. That's the place where they inspect and the bus have to stop to inspect. The two police officer (indiscernible) inside the bus. And they started to ask everybody an ID. And I have an ID and I showed them my ID. Senait, she don't have no ID. They questioned her name and she told them her name. They asked her to follow them and so they expel her from the bus and she go with them. Then after that I went after her. The police questioned me why did you follow us. I told them she is my wife that is the reason I was following you. Then after that well [80] okay we need you too then to follow us and then he take us to the police station.

Q. Dawit, when they asked Senait to get off the bus, do you know why they asked her to get off the bus?

A. Because her name, that was identified that she is an Eritrean and when they questioned and asked her her name and when she told them her name because they identified that she is an Eritrean and also that a lot of Eritreans that flee through that route.

Q. Did, if you know, did the police ask anyone else to get off the bus?

A. No.

Q. All right, so once you got to the police office what happened next?

A. They take us two separate room. And at first they questioned me. First they ask me are you taking people from Ethiopia to Eritrea, the Eritreans. I told them if you find any Eritrean inside the bus (indiscernible) guilty, but I'm not a smuggler and that's what I told them. But the good thing is there wasn't any Eritrean at that time inside the bus. Then after that we'll interrogate you and then they put me in different rooms.

Q. Dawit, were you smuggling Eritreans?

A. No.

Q. What was it you were trying to do when you were on

* * * *

A. Well everybody they detain (indiscernible) before they deported them.

Q. How did you feel thinking that you would never see Senait again?

A. At that time the Ethiopian government expel the Eritreans and we also when we leave the country and we never expect it's going to happen to us and so when these things happen so I was afraid it's going to take place.

Q. Did you ever ask anyone where Senait was when you were in the jail?

A. Yes.

Q. Who did you ask?

A. I ask the police.

Q. And what did he tell you?

A. They laugh at us. They joke us when you ask you them.

Q. Were you afraid when they said that to you?

A. Yes.

Q. How was it that you got out of jail?

A. That particular local area, the person who was detained his family when they brought him the food we used to share together his food. When he released and I told him where my mother, where she is working and to call my mother and to tell her where I was detained. And so after she find my mother and she went to the local police office, the police station, she went [88] there, she signed and she bonded me and then after they verify and they release me.

Q. Were there any conditions on your release from the jail?

A. Yes.

Q. What were they?

A. First to go back to Addis Ababa (indiscernible) which of the things that I was charged and to follow up. I did not receive any kind of summons but they just told me to go and look at the police station when should be able to go to the court, what court and all that, just to go and check everyday at the bulletin board at the police station.

Q. Dawit, did you ever go to court once you got out of jail?

A. No.

Q. Why not?

A. At that time it wasn't the time for me to go to court and at the same time also I used to scare.

Q. Why were you scared to go to court?

A. Number one I was charged for something I did not do. And number one I was accused for something I did not do. Number two, also I don't know the way to follow up and the

court's procedure. Number three, and I don't know how to win from the police officer. The police officer the one they charge me and I don't have any power to fight back with them.

[89] Q. Dawit, did you think that you could get a fair trial for that charge of smuggling Eritreans?

A. No.

Q. Why not?

A. Because my wife she's an Eritrean and even they consider me I'm the opposition of those local people.

Q. Do you know why the government thought you were in opposition to the local people?

A. Because I was helping the Eritreans.

Q. And they thought you were helping the Eritreans because you were married to Senait?

A. Yes.

Q. How or when was is that Senait got out of jail?

A. One month and a week.

Q. How long after you got out of jail did Senait get out of jail?

A. A week.

Q. How was it that you got Senait out of jail?

A. And I was negotiate with the police officer by give him a bribe and to release her.

Q. Why did it take you a week to be able to get her out of jail?

A. It's not that easy to give a bribe and I had to find out and how should be able to give a bribe and first I was scared. Even if I give them a bribe right on the spot probably [90] he could arrested me and I have to find out to approach him and I have to find out the way to give him.

Q. Why were you afraid to get - other than the fact that you were bribing the officer, why were you afraid to get Senait out of jail?

A. I did not understand your question.

Q. Why were you afraid to help Senait get out of jail?

A. Because I was afraid not to be deporting her.

Q. How much money did you pay to get Senait out of jail?

A. Five thousand Ethiopian birr.

JUDGE TO INTERPRETER

Q. To the interpreter, how do you spell birr?

A. B-I-R-R, birr.

Q. Thank you.

A. You're welcome.

MS. ROSICHAN TO MR. TESSEMA-DAMTE

Q. Where did that money come from that you used to bail Senait out of jail or to bribe the officer, I mean?

A. This money we saved.

Q. Were you saving the money for anything in particular?

A. Yes.

Q. And what was that?

* * * *

[94] Q. And why do you say that you wouldn't get equal justice?

A. First they charge me the police officers. If the police charge you and if they bring another police officer a witness, one police officer witness consider like three witness and after that I'll be charged. And after that also I cannot have any relationship with Senait and they will be deporting her.

Q. Okay. How long after you were arrested did you decide to leave Ethiopia?

A. Two weeks.

Q. Did Senait leave with you?

A. No.

Q. Why didn't you take Senait with you?

A. I was charged as a smuggler and I don't want to repeat it again. If I go first myself steady all the way and a peaceful

way to go, once I left and stabilize and after that Senait also she did not charge because the reason I was giving them the bribe was not to be a charge, any kind of pending suit against her and that was the reason first I left by myself.

JUDGE TO MR. TESSEMA-DAMTE

Q. And to the, to the witness, how long did - how long did you say it was after you were released from jail that you left Ethiopia?

A. Two weeks after she released.

Q. Two weeks after Senait was released?

[95] A. Yes.

JUDGE TO MS. ROSICHAN

Q. Proceed, Ms. Rosichan.

A. Thank you.

MS. ROSICHAN TO MR. TESSEMA-DAMTE

Q. Did you plan on sending for Senait?

INTERPRETER TO MS. ROSICHAN

Q. Excuse me?

MS. ROSICHAN TO MR. TESSEMA-DAMTE

Q. Did he, did he plan - Dawit, did you plan on having Senait come and join you later on?

A. Yes.

Q. Did you promise Senait that you would send for her?

A. Yes, I promised her I was going to bring her.

Q. Was it hard for you to say goodbye to Senait when you left?

A. Yes.

Q. And why?

A. I love her and I don't want to be apart from her and I don't want to leave her alone and I want her to be all the time with me.

Q. Did you think you would see her again when you left?

A. At the first time it was nightmare for me.

[96] Q. Where was it that you went when you left Ethiopia?

A. Kenya.

Q. How long did you stay in Kenya?

A. A week.

Q. And why did you leave Kenya?

A. My brother at that time he used to live in Kenya. He don't have no job. He told me about the situation. Then I decided to go in South Africa.

Q. Just to be clear what was, what year was it that you went to South Africa?

A. 1998.

Q. Where did you cross into South Africa?

A. From Kenya to South Zealand then after that we crossed the border and we went to South Africa.

Q. Was your passport stamped when you went into South Africa?

A. No.

Q. When you were in South Africa were you given any papers by the government?

A. Yes, I have a temporary permit.

JUDGE TO INTERPRETER

Q. I'm sorry, I didn't hear what you said?

A. Temporary permit.

Q. Thank you.

A. You're welcome.

* * * *

[122] I fell and I was having a miscarriage.

Q. Did you go to the hospital?

A. Yes.

Q. Do you want to have children?

A. Yes.

Q. Have you discussed with Dawit how many children you'd like to have?

A. Yes.

Q. How many children do you want to have?

A. Five.

Q. If you are granted asylum, will you make your marriage official in the United States?

A. Yes.

JUDGE TO MS. SCHEPPMANN

Q. I don't really understand, I don't understand the question. What do you mean will they make their marriage official in the United States?

A. Your Honor, would you like me to clarify?

Q. Yes.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. Will you get the piece of paper in addition to the common law marriage that you have?

A. Yes.

Q. All right, at some point did Ethiopia start ejecting people it designated as Eritrean?

[123] A. Yes.

Q. Why was Ethiopia ejecting ethnic Eritreans?

A. If I don't know even the exact details. The Ethiopians they said because whatever the problems they have, they started ejecting them.

Q. Was it because of the war?

A. Yes.

Q. Between? Between who?

A. Ethiopia and Eritrea.

Q. Okay. How did you hear about what the government was doing to Eritreans in Ethiopia?

A. You mean?

Q. I mean how did you hear about the expulsion of Eritreans from Ethiopia?

A. My mother when she went to church to pray and when she get there and she seen the people, when she heard from there many people they were deported and she continued her prayers so she scared and she came back to home.

Q. Did the government make any announcements about the deportations?

A. Yes, he did.

Q. What kind of announcement? Where did they make those announcements?

A. Radio.

Q. How did you feel about what they were doing?

[124] A. This is very bad.

Q. Did you feel that you and Dawit could be together in Ethiopia after you found out the government was kicking Eritreans out?

A. Where?

MS. SCHEPPMANN TO INTERPRETER

Q. Pardon me?

A. Where?

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. Did you feel that you and Dawit could be together in Ethiopia after you found out that the government was kicking Eritreans out?

A. Yes.

Q. In Ethiopia.

A. Yes.

Q. Did you think that you could be together with him in Ethiopia?

A. No.

Q. Why not?

A. Number one I am Eritrean and I have to be deported. He's also Ethiopian but because of that he cannot able to come with me.

Q. To where?

A. You mean?

Q. How, where, where were you going that he couldn't [125] come with you?

A. Eritrea.

Q. Okay. If the government had not kicked you out of Ethiopia, would you have stayed?

A. Yes.

Q. Yes. Why?

A. Because I was born and raised there.

Q. Did you and Dawit come up with a plan so that you could stay together at some point?

A. Yes.

Q. Yes. What was that plan?

A. To leave together.

Q. Leave together. Where did you want to go to?

A. I don't understand.

Q. You and Dawit decided to leave together, leave Ethiopia together because you couldn't stay in Ethiopia and he couldn't go to Eritrea, correct?

A. Both of us decided to leave the country.

Q. Where, what country did you decide to go to at that point?

A. Kenya, we was planned.

Q. Did you feel that you had any choice but to leave if you wanted to stay together?

A. No.

Q. What happened when you tried to leave Eritrea with [126] Dawit and go to Kenya or leave Ethiopia with Dawit and go to Kenya?

A. We held with the police.

JUDGE TO INTERPRETER

Q. I'm sorry, I didn't hear you?

A. We hold with the police.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. Were you arrested?

A. Yes.

Q. Why were you arrested?

A. I don't have an ID. I don't have a passport. And they asked me to get off from the bus. And when they take me from the bus, and he also come behind me and so they told him, they both, they took us together.

Q. How come you didn't have an Ethiopian passport or identification?

A. I used to have an Ethiopian ID.

Q. Was it taken away?

A. And when I wanted to renew and they took the ID and they told me to come back. When I came back because if you are an Eritrean we can't renew it and they confiscated my ID.

Q. Did they do that to all Eritreans?

A. Yes.

Q. How did they know that you were Eritrean?

A. When you obtain the ID and you have to fill out [127] the form and the form where you born and you have to put all your personal information.

Q. Okay. How did the police officers who arrested you know you were Eritrean if you had no identification?

A. If you don't have an ID and a passport, you cannot cross.

Q. And how did they, but how did they know that you were Eritrean?

A. When they asked me and I told them I don't have it. If I told them I do have it and they will ask me in what zone, what area, what region in you live then they will call and verify, then I will be lied because of that and I told them I don't, I don't have.

Q. You don't have. Can they tell you're Eritrean by your name?

A. Yes.

Q. Okay. Why was Dawit arrested?

A. When I get off from the bus and when they take me and he was following me and then he, they questioned him. You know where do you go and I say he, she's my wife and I was following her and I want to find out what's going on with her. So in that case okay we need you too and they put him in arrest also.

Q. Okay. Were you afraid?

A. Yes.

[128] Q. Why were you afraid?

A. Because I scared because if I'm an Eritrean and because of the transition I don't know what's going to happen and that's the reason I was afraid.

Q. Were you afraid for Dawit?

A. Who?

Q. Were you afraid when Dawit was arrested?

A. Yes.

Q. Yes, why were you afraid for Dawit?

A. Because he's an Ethiopian. I'm an Eritrean. We were both together. They would suspect him as a smuggler and that was I was worried about him, that happen something to him.

Q. Did the police ask you questions when you were in jail?

A. Yes.

Q. Did they make you cry?

A. Yes, I used to cry.

Q. What were you afraid, were you afraid of the guards?

A. Yes.

Q. Why were you afraid of the guards?

A. Because it was very dangerous when you are crossing the border illegally and for the Eritrean it will be more punishment.

Q. Did they punish Eritreans more than they punished [129] Ethiopians?

A. Yes.

Q. Why did they do that?

A. Because they don't have any paper or the paper they have it was confiscated. If they find them leaving the country without that legally and they will be punish them more than regular.

Q. Okay. How long were you detained?

A. One month and two weeks.

Q. How did you get out of jail?

A. The only thing I know is I just released.

Q. Released.

A. I don't even know how that I was released, but after I was released Dawit told me how that I was released.

Q. What did Dawit tell you?

A. He was give it to bribe.

Q. At some point did you and Dawit decide that he would leave Ethiopia?

A. You mean at that time?

Q. At that time. After you were released, did you decide?

A. I wasn't think about it and he was planned.

Q. He made the plan. Where did Dawit go?

A. Kenya.

Q. How did this make you feel?

* * * *

[145] and so they will escape you.

Q. At some point were you finally ejected from Ethiopia?

A. Yes.

Q. How did the military capture?

JUDGE TO MS. SCHEPPMANN

Q. Okay, well there's no, been no testimony that the military captured her, that it was the military rather than—

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. How did, how—

MS. SCHEPPMANN TO JUDGE

Q. I apologize, Your Honor.

A. Another agency.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. How did the police capture you?

A. They came to my workplace and so the time they came it was like shift exchange and I asked them to do, Senait we need you, we need you. I told them okay, let me do my shift exchange. So they don't allow me. So I was in the middle of, on the street and so I just give all the exchange there was, and to the left and the right side, I was in the middle so they grabbed my purse and so they take me.

Q. Just to clarify, who was it who was, who was capturing you at this point?

A. Police.

[146] Q. Police. What did you have with you when the police captured you?

A. I have money.

Q. Did you have your clothes?

A. I have the company's money and I have a uniform.

Q. What were the conditions like at the detention center where you were sent?

A. It's a big hall.

Q. Did you, did they give you food and water?

A. No.

Q. Did you have access to toilets?

A. You ask permission with the guard, and the guard he will take you and he will wait until you are finished and he will bring you back.

Q. How long were you in the detention center?

A. Three night and fourth day and I go, I left.

Q. What happened on that 4th day?

A. We went on a bus and we continue journey.

Q. How long was your journey?

A. It takes us four days and on the 5th day we arrive.

Q. What did the guards tell you when you got to the border?

JUDGE TO MS. SCHEPPMANN

Q. I'm unclear as to if you're talking about, which [147] guards? The guards from Ethiopia or the persons from the border from Eritrea.

A. Yes, Your Honor.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. At this time were you in the custody of Eritrean government or Ethiopian government?

A. Ethiopian.

Q. Was it the Ethiopian police who took you on the bus ride to the Ethiopian border?

A. Yes.

Q. What did the guards tell you when you got to the Ethiopian border?

A. And after we get off from the bus and they told us they are very small and narrow road and they told us just continuously walk, don't even go to the left or to the right, there was a bomb on the side. So make sure so that won't explode, just continue straight with this narrow road.

Q. What did you think would happen to you if you asked the guards for help?

A. You can't even say anything.

Q. Did the guards protect, provide you any protection on your walk?

A. You don't even get any kind of help and there was, when you crossed the border you will see the Red Cross and after you pass and somebody just to give us a water, they will carry [148] the water and that's the only thing you can get.

Q. What did the guards tell you were on the sides of the narrow walkway?

A. Make sure just go only straight forward, don't even go to the left or to the right. There are a bomb on the road.

Q. Did the guards tell you to be very, very quiet?

A. Yes.

Q. Why did the guards tell you to be quiet?

A. Because they, because when we go - they told us first to remain silent and this announcement they did on the bus when we get there. And that the bridge was broken so they cannot cross on the bus. Also almost halfway sink in the waters. So that's why we just crossed.

Q. Did the guards tell you to be quiet?

A. Yes.

Q. Why did they tell you to be quiet?

A. There are another guard on the other side of the part, if they heard any kind of your voice or any kind, if they heard any sound they start or maybe they going to shoot you.

Q. Was there fighting going on in that area?

A. I did not see.

Q. How long was the walk from the Ethiopian border to the Eritrean border?

A. It's about nine kilometers which is like going [149] from one town to another town.

Q. Was it in the desert?

A. Yes, like a desert but they have an asphalt.

Q. Who was with you at the time?

A. With a (indiscernible) and other older lady with a small child. There are older people. There are blind people. They are behind us.

Q. Were you afraid?

A. Yes.

Q. Why were you afraid?

A. Because the place where they told us if you move to the left and right and they told us there are a bomb and if, so we were scared if the bomb was explode so we was going to be killed.

Q. Did you think that you actually could die?

A. Yes.

Q. What happened when you got to the Eritrean border?

A. So when we crossed the border when the Eritrean guard when they see us and how come they didn't inform us. You guys stop and stop and so we stopped and that also and other people behind you and we told them yes. So after that they just wait for the other people.

Q. Who did they wait for?

A. So when we approach them, there was a, hold a gun and there was a kind of careful.

[150] Q. Did they point the gun at you?

A. No, they did not on us.

Q. What did the guard say to you?

JUDGE TO MS. SCHEPPMANN

Q. Are we talking about the Eritrean guards or the, or the Ethiopian guards?

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. At this point who were you talking to, was it the Eritrean guards or the Ethiopian guards?

A. The men, this point they were question us.

Q. At this point after she had made her walk, was she talking to the Ethiopian guards—

JUDGE TO MS. SCHEPPMANN

Q. Ask directly to the witness.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. Were you talking to the Ethiopian guard or the Eritrean guard?

A. Eritrea.

Q. Okay. Where did the Eritrean guards take you?

A. With the guard also there was a Red Cross and they gave us to the Red Cross and the Red Cross and they put us in another bus and they take us to another town.

Q. Okay. Did the Eritrean government help you to contact your family?

A. There was a lady, she was the secretary there, is [151] the one she doing all the register and I told her and I gave her my aunt's phone number and my mother's name. So she phoned my aunt. My aunt was to contact my mother and after that, then after that my aunt and my mother they came.

Q. Did they come pick you up?

A. No.

Q. When did your family come and pick you up?

A. Because we did not register, they cannot release us and they came, she came and visit me and after that she go back.

Q. How long did the Eritrean government hold you?

A. There was a big camp and we have to stay there and we have to register and we have to wait until the next day. So until they process and third day is where they take us to the city code Asmara.

JUDGE TO INTERPRETER

Q. Asmara, can we have a spelling on that?

A. A-S-, A-S-M-A-R-A.

Q. Thank you.

A. You're welcome.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. So then they detained you in Asmara?

A. Yes.

Q. How long did they detain you at Asmara?

A. No, they did not detain us in Asmara. When we go

* * * *

A. No.

Q. Was Dawit allowed to be with you while you were in Eritrea?

A. No.

Q. Did you miss him while you were in Eritrea?

A. Yes.

Q. What was the worst part about being in Eritrea?

A. Because I was separate from him.

Q. So Dawit could not come visit you in Eritrea?

A. No, he can't.

Q. How come he can't come visit you in Eritrea?

A. Because if he's an Ethiopian, Ethiopian they're not allowed to come to Eritrea.

Q. Okay. Because the government won't allow them to come to Eritrea?

A. Yes.

Q. How did he find out that you had been ejected from Ethiopia and were now living in Eritrea?

A. We used to correspond in letter.

Q. Did you send him a letter?

A. After I arrive in Eritrea.

Q. You mailed him a letter to South Africa?

A. Yes.

Q. When you were in Eritrea did the government give you an identification card?

[156] A. Yes.

Q. You said earlier they gave it to you at the camp.

A. Yes.

Q. What did that paper say?

A. Yeah, it's a commission (indiscernible) refugee.

Q. So do I under—

JUDGE TO INTERPRETER

Q. I'm sorry, you said commission?

A. Radiate—

MS. TESFAMICHAEL TO JUDGE

Q. I have the ID here.

A. Okay, well—

JUDGE TO INTERPRETER

Q. To the interpreter, I didn't get the second word.

A. She say commission radiate refugee.
Q. Okay.
A. I'm just trying to say exactly what she's saying.
Q. Thank you.

JUDGE TO MS. SCHEPPMANN

Q. Proceed.
A. Thank you, Your Honor.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. Do I understand that that card identified you as an Ethiopian refugee?
A. Yes.
[157] Q. Did you have to carry that card with you at all times?
A. Yes.
Q. Was that the same identification card that native Eritreans received?
A. No, it's not.
Q. When you were in Eritrea did Dawit send for you at some point?

INTERPRETER TO JUDGE

Q. Can you repeat it again.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. When you were in Eritrea, when you were in Eritrea did Dawit send for you at some point?
A. Later. And after that also he sent me the visa. After I arrive and after quite a while and he sent me the visa.
Q. Was that a visa to get into South Africa?
A. Yes.
Q. But you still had to get out of Eritrea, correct?
A. Yes.
Q. Do you love your family?
A. Yes.
Q. Was it hard for you to leave them?

A. Well you see you don't have no choice. After you're grown you still have to live with your husband. No matter what, you still have to leave your parents.

[158] Q. So your husband is more important than your family?

A. Yes.

Q. Even though you love your family?

A. Yes.

Q. Would the government let you leave when you got your exit, when you got your entrance visa for South Africa, did the government let you leave Eritrea?

A. Before they used to allow you to exit and now it's about a month and—I mean then because of the card you received, it's a different kind of card so we can't allow you to get an exit visa.

Q. So what did you have to do to escape Eritrea?

A. And I left through the country through the border which is illegal.

Q. So tell us how you got from Eritrea to South Africa.

A. From Asmara to Tesena and I went by bus.

JUDGE TO MS. SCHEPPMANN

Q. Can we have a spelling on that other city?

A. Cataro (phonetic sp.).

INTERPRETER TO JUDGE

Q. Tes, T-E-S-E-—

A. I'm sorry, spell it again.

Q. T, like Tom, E-S-E-N-A.

[159] A. Thank you.

Q. Tesena.

MS. SCHEPPMANN TO JUDGE

Q. And Sudan, S-U-D-A-N.

A. I didn't hear—

MS. TESFAMICHAEL TO MS. SCHEPPMANN

Q. Okay, this is a small town which is inside the Eritrea near the border which is called Tesena. Then after that I went to Kesela (phonetic sp.) and from Kesela and Caroso I went to Sudan.

JUDGE TO INTERPRETER

Q. Okay, can you spell the other name?
A. K-E-S-E-L-A.
Q. Thank you.
A. You're welcome.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. And this is all within Eritrea right now?
A. Tesena is within Eritrea. Kesela is within Sudan.
Q. Sudan. So how did you get across the border?
A. There are people there and you can pay them the money and that's where they can take you by car.
Q. Were you afraid while you were traveling from Eritrea to South Africa?
A. Yes.
Q. Why were you afraid?

* * * *

Q. And you said when you got a ID card in Ethiopia that you had to fill out personal information. What information on that ID card specifically would show you were, had any connection to Eritrea?

A. First you have to list all the family members and the place of birth and your nationality and your identity and you have to inform and that's the kind of form.

Q. Is it just your place of birth or all your family members places of birth?

A. This is in good times and that's why you have to fill out all the forms, that's why they will know you.

Q. Okay, but when - whose places of birth did you have to fill out for that, to get that card?

A. Kabali (phonetic sp.).

Q. Okay, let's back up. I was asking what showed you had a connection to Eritrea. What, and you talked about having to list people's places of birth. Did you have to tell them your place of birth?

A. At the form you have to list your father's and mother's place of birth and you have to specify with all the family members.

Q. In Ethiopia to have a common law marriage do you have to register that marriage with the government?

A. If you want to, you can obtain.

Q. But is it required?

* * * *

[171] JUDGE TO MS. TESFAMICHAEL

Q. To the respondent, to the witness, Counsel has no further questions for you, but I have some questions for you.

A. Okay.

Q. You are a citizen of the country of Eritrea, is that correct?

A. Yes.

Q. You testified earlier that you had a refugee card you were given in Eritrea.

A. Yes.

Q. But then later did you get citizenship in Eritrea?

A. No. It was obtained before when I was in Ethiopia.

Q. So when you were in Ethiopia you became a citizen of Eritrea?

A. Which is an election card, referendum.

Q. And by, was that the referendum for Eritrea to become a separate country?

A. Yes. Yes. Yes, not to be separated but just to be independent.

Q. And by filling out that card for the referendum you became a citizen of Eritrea?

A. Yes.

Q. And when did you fill out that card and became a citizen of Eritrea?

[172] A. 1992.

Q. So at that time when, after you became a citizen of Eritrea you were a citizen of both Eritrea and Ethiopia?

A. Yes.

Q. And you remain a citizen of Eritrea at this time?

A. Yes.

Q. And after you were deported from Ethiopia do you know what happened to your Ethiopian citizenship?

A. You mean after deport from Ethiopia?

Q. Yes.

A. Can you elaborate it.

Q. Were you still considered a citizen of Ethiopia?

A. Eritrea.

Q. But are you still considered a citizen of Ethiopia?

A. Before?

Q. No, after—right now?

A. You mean this time?

Q. At this time?

A. Eritrea.

Q. Okay, I understand that. But are you still considered a citizen of Ethiopia at this time?

A. Because if I was born there.

Q. Okay. What I'm asking you is after you were deported from Ethiopia, do you know if you still remain a citizen [173] of Ethiopia?

A. No, I don't consider. That was taken away from me.

Q. And how long did you live in Eritrea?

A. From 2000 to, from the time - I left in 2002.

Q. So you lived there for two years?

A. Yes.

Q. That's from June of 2000 to the end of 2002?

A. Yes, until I left the country.

Q. And during that entire time did you live with your mother?

A. Yes.

Q. And who else lived with you during that two years?

A. Me, my father and my mother and Aidan and Judit.

Q. And during that time did you, did you work in Eritrea?

A. Yes.

Q. What kind of work?

A. Mobil gas station.

Q. Is that the company Mobil, Mobil Oil Company?

A. Yes.

Q. What was your job?

A. As a cashier.

Q. Did you have any problems with the government of Eritrea?

* * * *

[178] Q. Okay, but it was required to have a visa to leave Eritrea?

A. I thought he was asking me from Ethiopia to Eritrea.

Q. No. I'm asking you from - what we're talking about now is September 2002 when you left Eritrea, at the end of 2002, that's when you left Eritrea, correct?

A. Yes.

Q. At that time was it required for all persons, all Eritrean citizens who wanted to leave Eritrea to have an exit visa?

A. First before they changed the law and with the ID card they gave us which it should be okay for everybody to obtain the exit visa, then by the time I would attempt but they changed the laws and so no one can obtain exit visa. Only for the people who deported, they should give them permission to get an exit visa. Later but they changed the law and they prohibited them to get an exit visa.

Q. Okay. But my question is is it required for all persons of Eritrea who want to leave the country to get an exit visa?

A. Yes.

Q. And that was required in the end of 2002 when you wanted to leave Eritrea?

A. Yes.

[179] Q. And why didn't you apply for an exit visa from Eritrea?

A. I did ask. First I did ask and when they told me no, you cannot then at that time I start to go through the border.

Q. And did they tell you why it was denied, your exit visa?

A. They say anybody from 18 years old to up to 40 nobody can leave the country.

Q. I don't have any further questions for you at this time.

JUDGE TO MS. SCHEPPMANN

Q. Ms. Scheppmann, do you have questions on redirect?

A. Yes, Your Honor. I just have a couple of short questions.

Q. Proceed.

MS. SCHEPPMANN TO MS. TESFAMICHAEL

Q. Senait, did you know—when you voted in the referendum, did you know that voting would make you an Eritrean citizen?

A. You mean the vote?

Q. Correct.

A. The only person that time who can vote, only the Eritreans.

Q. Did you want to be an Eritrean citizen?

[180] A. Yes.

Q. Did you feel that they expelled you for voting in that election?

A. No.

Q. I have one more question. Were they taking women in the military when you lived in Eritrea?

A. When I was there, I didn't see.

Q. Okay. Thank you. Thank you.

A. You're welcome.

JUDGE TO MS. SCHEPPMANN

Q. Ms. Scheppmann, any further questions?

A. No, Your Honor. Thank you very much.

JUDGE TO MS. WHATMOUGH

Q. Ms. Whatmough, any further questions?

A. No, Your Honor.

JUDGE TO MS. TESFAMICHAEL

Q. To the witness, there are no further questions for you. You can sit next to your counsel.

A. Thank you.

JUDGE TO MS. SCHEPPMANN

Q. Ms. Scheppmann, does the—do either of the respondents have any further evidence to present?

A. No, Your Honor, not at this time.

Q. When you say not at this time, we're about to close the record so do you have any evidence you want, anymore

* * * *

ORIGINAL

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. 1115-0086

Application for Asylum and for Withholding of Removal

Start Here - Please Type or Print. **USE BLACK INK. SEE THE SEPARATE INSTRUCTION PAMPHLET FOR INFORMATION ABOUT ELIGIBILITY AND HOW TO COMPLETE AND FILE THIS APPLICATION.** (Note: There is NO filing fee for this application.)

Please check the box if you also want to apply for withholding of removal under the Convention Against Torture ☐

PART A.I. INFORMATION ABOUT YOU

1. Alien Registration Number(s) (A# s) *(If any)*: A 97 746 470		2. Social Security No. *(If any)*: N/A
3. Complete Last Name: KIDANE TESFAMICHAEL	4. First Name: Senait	5. Middle Name:
6. What other names have you used? *(Include maiden name and aliases.)*: NONE		
7. Residence in the U.S.: C/O PISPC		Telephone Number: 956 547 1700
Street Number and Name: Box 341, Route 3, Buena Vista Drive		Apt. No.:
City: Los Fresnos	State: Texas	ZIP Code: 78566
8. Mailing Address in the U.S., if other than above		Telephone Number:
Street Number and Name		Apt. No.
City	State	ZIP Code

9. Sex: ☑ Male ☐ Female	10. Marital Status: ☐ Single ☑ Married ☐ Divorced ☐ Widowed		
11. Date of Birth *(Mo/Day/Yr)*: 9/11/1977	12. City and Country of Birth: Addis Ahaba, Ethiopia		
13. Present Nationality *(Citizenship)*: Eritrea	14. Nationality at Birth: Ethiopia	15. Race, Ethnic or Tribal Group: Tigrey	16. Religion: Christian

17. *Check the box, a through c that applies:* a. ☐ I have never been in immigration court proceedings.
b. ☑ I am now in immigration court proceedings. c. ☐ I am not now in immigration court proceedings, but I have been in the past.

18. *Complete 18 a through c.*
a. When did you last leave your country? *(Mo/Day/Yr)*: end of 2002 b. What is your current I-94 Number, if any?: N/A

c. Please list each entry to the U.S. beginning with your most recent entry.
List date (Mo/Day/Yr), place, and your status for each entry. (Attach additional sheets as needed.)

Date: 03/27/2004	Place: Hidalgo, TX	Status: EWI	Date Status Expires:		
Date:	Place:	Status:			
Date:	Place:	Status:			
Date:	Place:	Status:			

19. What country issued your last passport or travel document? Eritrea	20. Passport # / Travel Document #:	21. Expiration Date *(Mo/Day/Yr)*:
22. What is your native language? Tigrinya	23. Are you fluent in English? ☐ Yes ☑ No	24. What other languages do you speak fluently? Amharic

FOR EOIR USE ONLY

Recvd ~~INS~~/PISPC
Court 5:18 04 A.M.
Exh #2 eu 7/14/04 Ha

FOR INS USE ONLY

Action:
Interview Date:
Decision:
— Approval Date:
— Denial Date:
— Referral Date:
Asylum Officer ID#:

Form I-589 (Rev. 10/18/01)N

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APPENDIX F 70a

OMB No. 1115-0086

PART A. II. INFORMATION ABOUT YOUR SPOUSE AND CHILDREN

Your Spouse. ☐ I am not married *(Skip to Your Children, below.)*

1. Alien Registration Number (A#) *(If any)*	2. Passport/ID Card No. *(If any)*	3. Date of Birth *(Mo/Day/Yr)*	4. Social Security No. *(If any)*
A 97 746 471		02/01/1975	

5. Complete Last Name	6. First Name	7. Middle Name	8. Maiden Name
TESSEMA DAMTE	Dawit		

9. Date of Marriage *(Mo/Day/Yr)*	10. Place of Marriage	11. City and Country of Birth
(common law) 1997	Addis Ababa, Ethiopia	Addis Ababa, Ethiopia

12. Nationality *(Citizenship)*	13. Race, Ethnic or Tribal Group	14. Sex ☑ Male ☐ Female
Ethiopian	Amhara/Oromo	

15. Is this person in the U.S.? ☑ Yes *(Complete blocks 16 to 24.)* ☐ No *(Specify location)*

16. Place of last entry in the U.S.?	17. Date of last entry in the U.S. *(Mo/Day/Yr)*	18. I-94 No. *(If any)*	19. Status when last admitted *(Visa type, if any)*
Hidalgo, TX	3/27/2004	N/A	EWI

20. What is your spouse's current status?	21. What is the expiration date of his/her authorized stay, if any? *(Mo/Day/Yr)*	22. Is your spouse in immigration court proceedings?	23. If previously in the U.S., date of previous arrival *(Mo/Day/Yr)*
EWI/ asylum applicant	N/A	☑ Yes ☐ No	N/A

24. If in the U.S., is your spouse to be included in this application? *(Check the appropriate box.)*

☑ Yes *(Attach one (1) photograph of your spouse in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)*

☐ No

Your Children. Please list **ALL** of your children, regardless of age, location, or marital status.

☑ I do not have any children. *(Skip to Part A. III., Information about Your Background.)*

☐ I do have children. Total number of children _____

(Use Supplement A Form I-589 or attach additional pages and documentation if you have more than four (4) children.)

1. Alien Registration Number (A#) *(If any)*	2. Passport/ID Card No. *(If any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. Social Security No. *(If any)*

5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(Mo/Day/Yr)*

9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female

13. Is this child in the U.S.? ☐ Yes *(Complete blocks 14 to 21.)* ☐ No *(Specify Location)*

14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? *(Mo/Day/Yr)*	16. I-94 No. *(If any)*	17. Status when last admitted *(Visa type, if any)*

18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(Mo/Day/Yr)*	20. Is your child in immigration court proceedings?
		☐ Yes ☐ No

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*

☐ Yes *(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)*

☐ No

PART A. II. INFORMATION ABOUT YOUR SPOUSE AND CHILDREN Continued

1. Alien Registration Number (A#) (If any)	2. Passport/ID Card No. (If any)	3. Marital Status (Married, Single, Divorced, Widowed)	4. Social Security No. (If any)
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth (Mo/Day/Yr)
9. City and Country of Birth	10. Nationality (Citizenship)	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female
13. Is this child in the U.S.? ☐ Yes (Complete blocks 14 to 21.) ☐ No (Specify Location)			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? (Mo/Day/Yr)	16. I-94 No. (If any)	17. Status when last admitted (Visa type, if any)
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? (Mo/Day/Yr)	20. Is your child in immigration court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? (Check the appropriate box.) ☐ Yes (Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.) ☐ No			

1. Alien Registration Number (A#) (If any)	2. Passport/ID Card No. (If any)	3. Marital Status (Married, Single, Divorced, Widowed)	4. Social Security No. (If any)
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth (Mo/Day/Yr)
9. City and Country of Birth	10. Nationality (Citizenship)	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female
13. Is this child in the U.S.? ☐ Yes (Complete blocks 14 to 21.) ☐ No (Specify Location)			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? (Mo/Day/Yr)	16. I-94 No. (If any)	17. Status when last admitted (Visa type, if any)
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? (Mo/Day/Yr)	20. Is your child in immigration court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? (Check the appropriate box.) ☐ Yes (Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.) ☐ No			

1. Alien Registration Number (A#) (If any)	2. Passport/ID Card No. (If any)	3. Marital Status (Married, Single, Divorced, Widowed)	4. Social Security No. (If any)
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth (Mo/Day/Yr)
9. City and Country of Birth	10. Nationality (Citizenship)	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female
13. Is this child in the U.S.? ☐ Yes (Complete blocks 14 to 21.) ☐ No (Specify Location)			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? (Mo/Day/Yr)	16. I-94 No. (If any)	17. Status when last admitted (Visa type, if any)
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? (Mo/Day/Yr)	20. Is your child in immigration court proceedings? ☐ Yes ☐ No	

21. If in the U.S., is this child to be included in this application? (Check the appropriate box.)

☐ Yes (Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)

☐ No

PART A. III. INFORMATION ABOUT YOUR BACKGROUND

1. Please list your last address where you lived before coming to the U.S. If this is not the country where you fear persecution, also list the last address in the country where you fear persecution. *(List Address, City/Town, Department, Province, or State, and Country.) (Use Supplement B Form I-589 or additional sheets of paper if necessary.)*

Number and Street *(Provide if available)*	City/Town	Department, Province or State	Country	Dates From *(Mo/Yr)*	Dates To *(Mo/Yr)*
President Brandt & Midland	Blomfontien	Free State	South Africa	2002	10/2003
Dekemharic	Asmara		Eritrea	2000	2002

2. Provide the following information about your residences during the last five years. List your present address first. *(Use Supplement Form B or additional sheets of paper if necessary.)*

Number and Street	City/Town	Department, Province or State	Country	Dates From *(Mo/Yr)*	Dates To *(Mo/Yr)*
PISPC	Los Fresnos	Texas	USA	3/2004	present
Pres. Brandt/Midland	Blomfontien	Free State	South Africa	10/2002	10/2003
--	Khartoum		Sudan	9/2002	10/2002
Dekemharic	Asmara		Eritrea	6/2000	9/2002
Warada 4, Gebele 37	Addis Ababa		Ethiopia	1977	6/2000

3. Provide the following information about your education, beginning with the most recent. *(Use Supplement B Form I-589 or additional sheets of paper if necessary.)*

Name of School	Type of School	Location (Address)	Attended From *(Mo/Yr)*	Attended To *(Mo/Yr)*
Shimeles Habti	High School	Addis Ababa, Ethiopia	1988	1993

4. Provide the following information about your employment during the last five years. List your present employer first. *(Use Supplement Form B or additional sheets of paper if necessary.)*

Name and Address of Employer	Your Occupation	Dates From *(Mo/Yr)*	Dates To *(Mo/Yr)*
Mobil Oil, Dekemharic, Asmara, Eritrea	(part-time) gas station attendant	2000	2002
Mobil Oil, Addis Ababa, Ethiopia	gas station attendant	1996	2000

5. Provide the following information about your parents and siblings (brothers and sisters). Check box if the person is deceased. *(Use Supplement B Form I-589 or additional sheets of paper if necessary.)*

Name	City/Town and Country of Birth	Current Location
Mother Lettbrhan-Sium Gebraselassi	Dekemhari, Asmara, Eritrea	☐ Deceased Dekemhari, Asmara, Eritrea
Father Kidane Tesfamichael	Toukool, Asmara, Eritrea	☑ Deceased
Siblings Daniel, Kidane	Dekemhari, Asmara, Eritrea	☐ Deceased Eritrea
Judit, Natnael, Netsanet and Eden Kidane	Addis Ababa, Ethiopia	☐ Deceased Eritrea (Judit, Natnael, Eden) Atlanta, GA (USA) - Netsanet

PART B. INFORMATION ABOUT YOUR APPLICATION

(Use Supplement B Form I-589 or attach additional sheets of paper as needed to complete your responses to the questions contained in PART B.)

When answering the following questions about your asylum or other protection claim (withholding of removal under 241(b)(3) of the Act or withholding of removal under the Convention Against Torture) you should provide a detailed and specific account of the basis of your claim to asylum or other protection. To the best of your ability, provide specific dates, places, and descriptions about each event or action described. You should attach documents evidencing the general conditions in the country from which you are seeking asylum or other protection and the specific facts on which you are relying to support your claim. If this documentation is unavailable or you are not providing this documentation with your application, please explain why in your response to the following questions. Refer to Instructions, Part I: Filing Instructions, Section II, "Basis of Eligibility," Parts A - D, Section V, "Completing the Form," Part B, and Section VII, "Additional Documents that You Should Submit" for more information on completing this section of the form.

1. Why are you applying for asylum or withholding of removal under section 241(b)(3) of the Act, or for withholding of removal under the Convention Against Torture? Check the appropriate box (es) below and then provide detailed answers to questions A and B below:

   I am seeking asylum or withholding of removal based on

   - ☐ Race
   - ☐ Religion
   - ☑ Nationality
   - ☑ Political opinion
   - ☑ Membership in a particular social group
   - ☑ Torture Convention

   A. Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in the past by anyone?

   ☐ No ☑ Yes If your answer is "Yes," explain in detail:

   1) What happened;
   2) When the harm or mistreatment or threats occurred;
   3) Who caused the harm or mistreatment or threats; and
   4) Why you believe the harm or mistreatment or threats occurred.

   In 2002, the Ethiopian government deported me from Ethiopia, where I was born and had lived my whole life, to Eritrea. My husband did not know I was deported until he received a letter from me. My two brothers were forced to do military service in Eritrea, which usually lasts 18 months, but the Eritrean government will not let them leave-they have been in the military 5-6 years. When my father died this year, the army would not let my brothers attend the funeral. In Eritrea the police came to my work and made threats-saying things like: "We will take you to the military, and you will see what is going to happen to you." We have heard many stories about women being raped in the military camps, and I was afraid I would never be able to see my family again. I was the only support of my family. I panicked every time I saw the police pass by. It is almost impossible to leave Eritrea, with or without a visa. If you leave without permission your life will be in danger. I managed to escape to Sudan in 2002, and my husband arranged for a visa to join him in South Africa. In 1998 the Ethiopian government was deporting Eritreans, so my husband and I decided to leave for Kenya. ...(see add'l page)

   B Do you fear harm or mistreatment if you return to your home country?

   ☐ No ☑ Yes If your answer is "Yes," explain in detail:

   1) What harm or mistreatment you fear;
   2) Who you believe would harm or mistreat you; and
   3) Why you believe you would or could be harmed or mistreated.

   I believe the Eritrean government would punish me for leaving the country illegally. They would put me in jail, torture me, and force me to join the military. Women are routinely raped by the soldiers in the military camps. Also if you go the army from jail, you are sent to do hard labor. My husband is Ethiopian and cannot live in Eritrea. Being separated from him my heart would break with sorrow.

74a

PART B. INFORMATION ABOUT YOUR APPLICATION Continued

2. Have you or your family members ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned in any country other than the United States?

☐ No ☑ Yes If "Yes," explain the circumstances and reasons for the action.

I was arrested in Ethiopia in 1998 when I tried to leave the country with my husband. I served more than a month without any lawful charges being made against me. My husband paid for me to be released.

3. A. Have you or your family members ever belonged to or been associated with any organizations or groups in your home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerilla organization, ethnic group, human rights group, or the press or media?

☑ No ☐ Yes If "Yes," describe for each person the level of participation, any leadership or other positions held, and the length of time you or your family members were involved in each organization or activity.

B. Do you or your family members continue to participate in any way in these organizations or groups?

☑ No ☐ Yes If "Yes," describe for each person, your or your family members' current level of participation, any leadership or other positions currently held, and the length of time you or your family members have been involved in each organization or group.

4. Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?

☐ No ☑ Yes If "Yes," explain why you are afraid and describe the nature of the torture you fear, by whom, and why it would be inflicted.

I believe the Eritrean government would punish me for leaving the country illegally. They would put me in jail, torture me, and force me to join the military. Women are routinely raped by the soldiers in the military camps. Also if you go the army from jail, you are sent to do hard labor. My husband is Ethiopian and cannot live in Eritrea. Being separated from him my heart would break with sorro

PART C. ADDITIONAL INFORMATION ABOUT YOUR APPLICATION

(Use Supplement B Form I-589 or attach additional sheets of paper as needed to complete your responses to the questions contained in Part C.)

1. Have you, your spouse, your child(ren), your parents, or your siblings ever applied to the United States Government for refugee status, asylum, or withholding of removal? ☑ No ☐ Yes

If "Yes" explain the decision and what happened to any status you, your spouse, your child(ren), your parents, or your siblings received as a result of that decision. Please indicate whether or not you were included in a parent or spouse's application. If so, please include your parent or spouse's A- number in your response. If you have been denied asylum by an Immigration Judge or the Board of Immigration Appeals, please describe any change(s) in conditions in your country or your own personal circumstances since the date of the denial that may affect your eligibility for asylum.

2. A. After leaving the country from which you are claiming asylum, did you or your spouse or child(ren), who are now in the United States, travel through or reside in any other country before entering the United States? ☐ No ☑ Yes

B. Have you, your spouse, your child(ren), or other family members such as your parents or siblings ever applied for or received any lawful status in any country other than the one from which you are now claiming asylum? ☑ No ☐ Yes

If "Yes"to either or both questions (2A and/or 2B), provide for each person the following: the name of each country and the length of stay; the person's status while there; the reasons for leaving; whether the person is entitled to return for lawful residence purposes; and whether the person applied for refugee status or for asylum while there, and, if not, why he or she did not do so.

When I left Eritrea in 2002, I spent about one month in Sudan. From Sudan I flew to South Africa, where I lived with my husband for about a year (2002-2003). I applied for asylum there but I never received any asylum papers. The only thing they gave me was a protection paper from the police (Home Affairs) so that I would not be arrested - there was a condition on these papers that I could not work or study in South Africa. My husband and I left South Africa in October 2003. We flew to Cuba, where we were 4 days, then to Nicaragua (one week), then Guatemala (2 days), then Mexico (3-4 months)

3. Have you, your spouse, or child(ren) ever ordered, incited, assisted, or otherwise participated in causing harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion?

☑ No ☐ Yes If "Yes," describe in detail each such incident and your own or your spouse's or child(ren)'s involvement.

PART C. ADDITIONAL INFORMATION ABOUT YOUR APPLICATION Continued

4. After you left the country where you were harmed or fear harm, did you return to that country?

☑ No ☐ Yes If "Yes," describe in detail the circumstances of your visit (for example, the date(s) of the trip(s), the purpose(s) of the trip(s), and the length of time you remained in that country for the visit(s)).

5. Are you filing the application more than one year after your last arrival in the United States?

☑ No ☐ Yes If "Yes," explain why you did not file within the first year after you arrived. You should be prepared to explain at your interview or hearing why you did not file your asylum application within the first year after you arrived. For guidance in answering this question, see Instruction, Part 1: Filing Instructions, Section V. "Completing the Form," Part C.

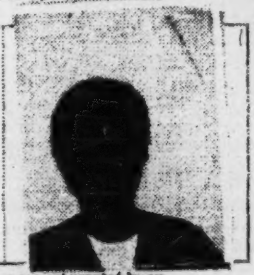
6. Have you or any member of your family included in the application ever committed any crime and/or been arrested, charged, convicted and sentenced for any crimes in the United States?

☑ No ☐ Yes If "Yes," for each instance, specify in your response what occurred and the circumstances; dates; length of sentence received; location; the duration of the detention or imprisonment; the reason(s) for the detention or conviction; any formal charges that were lodged against you or your relatives included in your application; the reason(s) for release. Attach documents referring to these incidents, if they are available, or an explanation of why documents are not available.

PART D. YOUR SIGNATURE

Read the following carefully, sign your name (and penalties on the impressions), complete and sign below. If someone helped you prepare this application, he or she must complete Part E.

I certify, under penalty of perjury under the laws of the United States of America, that this application and the evidence submitted with it are all true and correct. Title 18, United States Code, Section 1546, provides in part: Whoever knowingly makes under oath, or as permitted under penalty of perjury under Section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or knowingly presents any such application, affidavit, or other document containing any such false statement or which fails to contain any reasonable basis in law or fact shall be fined in accordance with this title or imprisoned not more than five years, or both." I authorize the release of any information from my record which the Immigration and Naturalization Service needs to determine eligibility for the benefit I am seeking.



WARNING: Applicants who are in the United States illegally are subject to removal if their asylum or withholding claims are not granted by an Asylum Officer or an Immigration Judge. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings even if the application is later withdrawn. Applicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act. See 208(d)(6) of the Act and 8 CFR 208.20.

Print Complete Name	Write your name in your native alphabet
Sonia Maria Tessmann	ሶንያ ማሪያ ተሰማን

Did your spouse, parent, or child(ren) assist you in completing this application? ☐ No ☑ Yes *(If "Yes," list the name and relationship.)*

Tessmann	Victoria		
(Name)	*(Relationship)*	*(Name)*	*(Relationship)*

Did someone other than your spouse, parent, or child(ren) prepare this application? ☐ No ☑ Yes *(If "Yes," complete Part E)*

Asylum applicants may be represented by counsel. Have you been provided with a list of persons who may be available to assist you, at little or no cost, with your asylum claim? ☐ No ☑ Yes

Signature of Applicant *(The person in Part A.1.)*

[X _____]
Sign your name as it all appears within the brackets

5/17/04
Date (Mo/Day/Yr)

PART E. DECLARATION OF PERSON PREPARING FORM IF OTHER THAN APPLICANT, SPOUSE, PARENT OR CHILD

I declare that I have prepared this application at the request of the person named in Part D, that the responses provided are based on all information of which I have knowledge, or which was provided to me by the applicant and that the completed application was read to the applicant in his or her native language or a language he or she understands for verification before he or she signed this application in my presence. I am aware that the knowing placement of false information on the Form I-589 may also subject me to civil penalties under 8 U.S.C. 1324c).

Signature of Preparer	Print Complete Name	
	Kim Sullivan	
Daytime Telephone Number	Address of Preparer: Street Number and Name	
(956) 425 9231	301 E. Madison Ave	
Apt. No.	City	State	ZIP Code
	Harlingen	TX	78550

PART F. TO BE COMPLETED AT INTERVIEW OR HEARING

You will be asked to complete this Part when you appear before an Asylum Officer of the Immigration and Naturalization Service (INS), or an Immigration Judge of the Executive Office for Immigration Review (EOIR) for examination.

I swear (affirm) that I know the contents of this application that I am signing, including the attached documents and supplements, that they are all true to the best of my knowledge (taking into account correction(s) numbered _____ to _____) that were made by me or at my request.

Signed and sworn to before me by the above named applicant on.

_____
Signature of Applicant

7/14/04
Date (Mo/Day/Yr)

ሶንያ ማሪያ ተሰማን
Write Your Name in Your Native Alphabet

Harold Ceballos
Signature of Asylum Officer or Immigration Judge

A # *(If available)*	Date
Applicant's Name	Applicant's Signature

LIST ALL OF YOUR CHILDREN, REGARDLESS OF AGE OR MARITAL STATUS.
(Use this form and attach additional pages and documentation as needed to your application if you have more than four (4) children.)

1. Alien Registration Number (A#)*(If any)*	2. Passport/ID Card No. *(If any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. Social Security No. *(If any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(Mo/Day/Yr)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female
13. Is this child in the U.S.? ☐ Yes *(Complete blocks 14 to 21.)* ☐ No *(Specify Location)*			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? *(Mo/Day/Yr)*	16. I-94 No. *(If any)*	17. Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(Mo/Day/Yr)*	20. Is your child in immigration court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)* ☐ Yes *(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)* ☐ No			

1. Alien Registration Number (A#)*(If any)*	2. Passport/ID Card No. *(If any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. Social Security No. *(If any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(Mo/Day/Yr)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female
13. Is this child in the U.S.? ☐ Yes *(Complete blocks 14 to 21.)* ☐ No *(Specify Location)*			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? *(Mo/Day/Yr)*	16. I-94 No. *(If any)*	17. Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(Mo/Day/Yr)*	20. Is your child in immigration court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)* ☐ Yes *(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)* ☐ No			

ADDITIONAL INFORMATION ABOUT YOUR CLAIM TO ASYLUM.

A # *(If available)* A 97 746 470	Date 5/17/04
Applicant's Name Senait KIDANE TESFAMICHAEL	Applicant's Signature

Use this as a continuation page for any information requested. Please copy and complete as needed.

PART B.

QUESTION 1.A

(continued)
I was arrested near the Ethiopian border, put in jail and accused of being an escaped Eritrean soldier. I was interrogated two or three times a day. I was constantly insulted. I was told I would be kept in the jail because the Ethiopian government believed that if I was sent back to Eritrea I would become a soldier and fight the Ethiopians. The jail was filthy, they barely fed us with bad food and dirty water, there was no sanitation inside the jail, there were no beds. After a month in detention, my husband paid to have me released.

My whole family, who had been living in Addis Ababa for many years, was deported separately between 1998 and 1999. I stayed a bit longer. I had a residence card, which had to be renewed every six months. Ethiopian authorities came to where I was working in Addis and took me to the police station, where I was held for 3 days, with no food. Then I was put on a bus to Eritrea.

My husband had left for South Africa shortly after we were released from the jail in 1998. He sent me a visa to join him in South Africa, but the Eritrean government would not let me leave. Finally in 2002 I managed to escape to Sudan.

Amendments to Form I-589

Application for Asylum/Withholding of Removal of
Senait KIDANE TESFAMICHAEL
A 97 746 470

Part A, Sec. I (page 1)

Question 9: Box for "Female" should be checked instead of "Male."

Question 11: Birth date should be "9/11/1976" instead of 1977. [Note: The Ethiopian calendar is different from the European calendar.]

Part A, Sec. III (page 4)

Question 5: Siblings

Name	City/Town and Country of Birth	Current Location
Judith Kidane (born 1972) Daniel Kidane (born 1974)	Asmara, Eritrea Asmara, Eritrea	Dekamhari, Asmara, Eritrea
Natnael Kidane and Netsanet Kidane (twins) Eden Kidane	All three born in Addis Ababa, Ethiopia	Natnael is in Eritrea Netsanet is in the U.S. (Georgia) Eden is in Eritrea

Part B, I, A (page 5)

First words should be "In 2000" rather than "In 2002."

Recvd HLG/PISPC
Court 7/14/03 G.M.

Signature

13-7-04
Date

BEST AVAILABLE COPY

APPENDIX G

UNITED STATES CODE ANNOTATED

TITLE 8
Aliens and Nationality
§§ 1 to 1157

Comprising All Laws of a General and
Permanent Nature Under Arrangement of the
Official Code of the Laws of the United States with
Annotations from Federal Courts

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§ 1101. Definitions

(a) As used in this chapter

(1) The term "administrator" means the official designated by the Secretary of State pursuant to section 1104(b) of this title.

(2) The term "advocates" includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an

alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that (A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is

* * * *

on the Status of International Military Headquarters" set up pursuant to the North Atlantic Treaty, or as a dependent); and

(iii) to the Immigration Technical Corrections Act of 1988 or to the Immigration and Nationality Technical Corrections Act of 1994 were a reference to the American Competitiveness and Workforce Improvement Act of 1998.[2]

(M) subject to the numerical limitations of section 1153(b)(4) of this title, an immigrant who seeks to enter the United States to work as a broadcaster in the United States for the International Broadcasting Bureau of the Broadcasting Board of Governors, or for a grantee of the Broadcasting Board of Governors, and the immigrant's accompanying spouse and children.

(28) The term "organization" means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

(29) The term "outlying possessions of the United States" means American Samoa and Swains Island.

(30) The term "passport" means any travel document issued by competent authority showing the bearer's origin,

identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.

(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32) The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

(34) The term "Service" means the Immigration and Naturalization Service of the Department of Justice.

(35) The term "spouse", "wife", or "husband" do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

(36) The term "State" includes the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States.

(37) The term "totalitarian party" means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the

country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

(39) The term "unmarried", when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married.

(40) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.

(41) The term "graduates of a medical school" means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually resid-

ing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at3 least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

APPENDIX H

UNITED STATES CODE ANNOTATED

TITLE 8
Aliens and Nationality
§§ 1158 to 1182f

Comprising All Laws of a General and
Permanent Nature Under Arrangement of the
Official Code of the Laws of the United States with
Annotations from Federal Courts

SUBCHAPTER II—IMMIGRATION

PART I—SELECTION SYSTEM

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the

case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence,

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the

United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(c) Asylum status (1) In general

In the case of an alien granted asylum under subsection (b) of this section, the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) of this section does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that

(A) the alien no longer meets the conditions described in subsection (b)(1) of this section owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2) of this section;

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under

section[1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

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[1] So in original. Probably should be "sections".

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications (A) Procedures

(A) The procedure established under paragraph (1) shall provide that—

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within

30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(June 27, 1952, c. 477, Title II, ch. 1. § 208, as added Mar. 17, 1980, Pub.L. 96-212, Title II, § 201(b), 94 Stat. 105, and amended Nov. 29, 1990, Pub.L. 101-649, Title V, § 515(a)(1), 104 Stat. 5053; Sept. 13, 1994, Pub.L. 103-322, Title XIII, § 130005(b), 108 Stat. 2028; Apr. 24, 1996, Pub.L. 104-132, Title IV, § 421(a), 110 Stat. 1270; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title VI, § 604(a), 110 Stat. 3009-690; Oct. 26, 2001, Pub.L. 107-56, Title IV, § 411(b)(2), 115 Stat. 348; Aug. 6, 2002, Pub.L. 107-208, § 4, 116 Stat. 928; May 11, 2005, Pub.L. 109-13, Div. B, Title I, § 101(a), (b), 119 Stat. 302, 303.)

APPENDIX I

CODE OF FEDERAL REGULATIONS
Revised as of January 1, 2006

Aliens and Nationality

Containing a codification of documents of general applicability and future effect

As of January 1, 2006

With Ancillaries

Published by

Office of the Federal Register National Archives and Records Administration

A Special Edition of the Federal Register

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* * * *

based on information elicited from the asylum interview, an asylum officer may refer the applicant directly to an immigration judge in removal proceedings under section 240 of the Act, without conducting a separate credible fear interview pursuant to § 208.30. If such applicant is not found to have a credible fear based on information elicited at the asylum interview, an asylum officer will conduct a credible fear interview and the applicant will be subject to the credible fear process specified at §208.30(b).

(B) *Inadmissible on other grounds.* In the case of an applicant who was paroled into the United States on or after April 1. 1997. and will be charged as inadmissible to the United States under provisions of the Act other than, or in addition to, sections 212(a)(6)(C) or 212(a)(7), the asylum officer shall

refer the application to an immigration judge for adjudication in removal proceedings.

(d) *Applicability of §103.2(b) of this chapter.* No application for asylum or withholding of deportation shall be subject to denial pursuant to §103.2(b) of this chapter.

(e) *Duration.* If the applicant is granted asylum, the grant will be effective for an indefinite period, subject to termination as provided in § 208.24.

(f) *Effect of denial of principal's application on separate applications by dependents.* The denial of an asylum application filed by a principal applicant for asylum shall also result in the denial of asylum status to any dependents of that principal applicant who are included in that same application. Such denial shall not preclude a grant of asylum for an otherwise eligible dependent who has filed a separate asylum application, nor shall such denial result in an otherwise eligible dependent becoming ineligible to apply for asylum due to the provisions of section 208(a)(2)(C) of the Act.

(g) *Applicants granted lawful permanent residence status.* If an asylum applicant is granted adjustment of status to lawful permanent resident, the Service may provide written notice to the applicant that his or her asylum application will be presumed abandoned and dismissed without prejudice, unless the applicant submits a written request within 30 days of the notice, that the asylum application be adjudicated. If an applicant does not respond within 30 days of the date the written notice was sent or served, the Service may presume the asylum application abandoned and dismiss it without prejudice.

[62 FR 10337, Mar. 6. 1997, as amended at 63 FR 12986. Mar. 17, 1998; 64 FR 27875, May 21. 1999: 65 FR 76134, Dec. 6. 2000]

§ 208.15 Definition of "firm resettlement."

An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

(a) That his or her entry into that country was a necessary consequence of his or her flight from persecution. that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country: or

(b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing whether permanent or temporary made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

[65 FR 76135, Dec. 6, 2000]